20

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1911

No. [redacted] 15

JAMES W. FINLEY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED MARCH 19, 1909.

(21,543.)

(21,543.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1908.

No. 747.

JAMES W. FINLEY, PLAINTIFF IN ERROR,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 11, 1909.

1 In the Supreme Court of the United States.

JAMES W. FINLEY, Appellant and Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent & Defendant in Error.

Transcript of the Record.

Samuel T. Bush, Attorney for Appellant and Plaintiff in Error.
U. S. Webb, Attorney General, and Attorney for Respondent and Defendant in Error.

2 *Indictment.*

In the Superior Court of the County of Sacramento, the 10th Day of August, A. D. 1906.

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

J. W. FINLEY, Defendant.

J. W. Finley is accused by the Grand Jury of the County of Sacramento, by this indictment, of the crime of assault upon another person with a deadly weapon and with malice aforethought; said J. W. Finley being then and there a prisoner undergoing a life sentence in a State prison of the State of California, committed as follows:

The said J. W. Finley on the 29th day of December, A. D., 1904, at the said County of Sacramento, in the said State of California, and before the finding of this indictment, did then and there willfully, unlawfully, feloniously and of his malice aforethought, commit an assault upon the person of another, to wit: R. J. Murphy, a human being, with a certain deadly weapon, to wit: a long bladed, sharp pointed knife, then and there in his, the said J. W. Finley's hand had and held; that at said time and place of the commission of said assault, as aforesaid, the said J. W. Finley was then and there a prisoner confined in -nd undergoing a life sentence at the State prison at Folsom, in the County of Sacramento, State of California, said prison being a State prison of the State of California, and said assault having been committed within the said prison, contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the People of the State of California.

A. M. SEYMOUR,
District Attorney of Sacramento County, in the State of California.

3 Endorsed: No. 4165. The People of the State of California against J. W. Finley, defendant. Indictment for as-

sault with a deadly weapon with malice aforethought, defendant being a prisoner undergoing a life sentence in a State Prison. A true Bill. Geo. M. Mott, Foreman.

Presented in the Superior Court of the County of Sacramento, in open Court, in the presence of the Grand Jury, by their Foreman, and filed as a record of said Court, this 10th day of August, A. D. 1905.

W. B. HAMILTON, *Clerk,*
By M. J. SULLIVAN,
Deputy Clerk.

A. M. SEYMOUR,
District Attorney.
S. T. BUSH,
Defendant's Attorney.

Names of witnesses examined before Grand Jury: W. H. Harris, R. J. Murphy, C. H. Jolly, C. L. Taylor.

Demurrer to Indictment.

(Title of Court and Cause.)

Now comes the defendant above named and demurs to the indictment heretofore filed in the above entitled action, on the following grounds, to wit:

I.

That the Grand Jury of Sacramento County, by which said indictment was found, had no legal authority to inquire into the offense charged, by reason of its not being within the legal jurisdiction of said Sacramento County:

1. Because the punishment prescribed for the commission of said offense, as charged in said indictment, is cruel and unusual and in violation of law.

2. Because all persons standing in the same class and in the same position, relatively, committing said offense, are not punished equally or alike.

4 3. Because the statute prescribing, promulgating and limiting said offense contemplates solely the amount of punishment inflicted for the commission of the prior offense in prescribing the increased punishment to be inflicted for the commission of the subsequent offense, instead of contemplating the nature or gravity of the prior offense in order to fix the amount of increased punishment for the commission of the subsequent offense.

4. Because by reason of the foregoing averments said statute prescribing said offense is unlawful, void and illegal.

SAMUEL T. BUSH,
Attorney for Defendant.

Dated September 16th, 1905.

Endorsed: No. 4165. Dept. No. 3. In the Superior Court of the County of Sacramento, State of California. People of the State of California, plaintiff, *vs.* J. W. Finley, defendant. Demurrer. Filed Nov. 11, 1905. W. B. Hamilton, Clerk, by M. J. Sullivan, Deputy. Samuel T. Bush, Attorney for Defendant, Rooms 21 and 22 Stoll Building, Sacramento, Cal. Due service of within demurrer admitted by copy this 23rd day of September, 1905. A. M. Seymour, Attorney for People.

5 *Verdict of Jury of Sacramento County.*

In the Superior Court of the State of California in and for the County of Sacramento.

(Title of Court and Cause.)

We, the jury in the above entitled cause, find that the defendant is a prisoner undergoing a sentence of life imprisonment in the State Prison at Folsom; that said defendant is guilty as charged in the indictment.

O. W. ERLEWINE, *Foreman.*

Judgment of Superior Court of Sacramento County.

In the Superior Court of the State of California in and for the County of Sacramento.

(Title of Court and Cause.)

Convicted of assault with a deadly weapon with malice aforethought, defendant being a prisoner undergoing a life sentence in a State prison.

WEDNESDAY, *December 27th, A. D.* 1905.

Present: Hon. E. C. Hart, Judge.

This being the day heretofore designated by the Court for rendering judgment against the defendant, J. W. Finley, upon the verdict of the jury heretofore rendered herein; and the said defendant now appearing personally in Court, attended by his counsel, Samuel T. Bush, and the District Attorney also appearing on behalf of the People; thereupon counsel for defendant made a motion in arrest of judgment, which motion was by the Court denied, to which ruling the defendant duly excepted; thereupon counsel for defendant made a motion for a new trial of said cause, which motion was by the Court denied, to which ruling the defendant duly excepted.

6 Whereupon, the Court now proceeds to pronounce judgment upon the defendant, J. W. Finley, and after informing him, the said J. W. Finley, of the indictment filed against him, and of the nature of the charge, of his plea of not guilty thereto, and of

his subsequent trial before a jury and conviction, and thereupon the said defendant was asked by the Court whether he had any legal cause to show why judgment should not be pronounced against him; and no cause being shown or appearing, the Court renders judgment as follows:

It is ordered and adjudged, that you, J. W. Finley, be taken hence to the County Jail of this County, and be there detained in close confinement until such time, within ten days, as the Sheriff of the County of Sacramento shall deliver you to the Warden of the State Prison at Folsom, State of California, where you will be detained in close confinement until such day as shall be designated in the warrant of execution of this judgment, and on the day so designated you will be, by the Warden, in some place within the walls of said State Prison at Folsom, hanged by the neck until you are dead.

Dated, December 27th, 1905.

E. C. HART,
Judge of the Superior Court.

Attest:
[SEAL.] W. B. HAMILTON, *Clerk.*
By M. J. SULLIVAN, *Deputy Clerk.*

7 *Notice of Appeal.*

In the Superior Court in and for the County of Sacramento, State of California.

(Title of Court and Cause.)

To A. M. Seymour, Esq., District Attorney of Sacramento County, State of California, and W. B. Hamilton, Esq., County Clerk of said County, and *ex officio* Clerk of the Superior Court of said County and State:

You, and each of you, will please take notice that the defendant above named, J. W. Finley, hereby appeals to the Supreme Court of the State of California, from the judgment duly given made and rendered against said J. W. Finley, in said action, on the 27th day of December, 1905, and from the order denying said defendant's motion for a new trial made and entered in said cause on said 27th day of December, 1905, and from the whole of said judgment and order.

SAMUEL T. BUSH,
Attorney for Defendant, J. W. Finley,
Rooms 473-474, Parrott Building, San Francisco.

Dated, this 1st day of February, 1906.

Endorsed: No. 4165. Dept. 3. In the Superior Court in and for the County of Sacramento, State of California. People, etc., plaintiff *vs.* J. W. Finley, defendant. Notice of Appeal. Filed Feb. 1, 1906. W. B. Hamilton, Clerk, by M. J. Sullivan, Deputy. Samuel

T. Bush, Attorney for Defendant, Rooms 473-474 Parrott Building, San Francisco, Cal. Due service of within notice of appeal admitted by copy this 1st day of February, 1906. A. M. Seymour, Attorney for plaintiff and District Attorney.

Endorsed: Filed February 1st, 1906. W. B. Hamilton, Clerk, by M. J. Sullivan Deputy Clerk.

8 *Assignment of Errors.*

In the Supreme Court of the United States.

J. W. FINLEY, Defendant and Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent in Error.

The defendant and plaintiff in error files the following Assignment of Errors upon which he will rely and prosecute a Writ of Error in the above entitled cause:

That the Supreme Court of the State of California erred in holding and deciding

1.

That section 246 of the Penal Code of the State of California does not contr-vene and violate section 1 of the 14th Amendment to the Constitution of the United States.

2.

That the said Court erred in holding and deciding that said section 246 of said Penal Code does not make an arbitrary classification of persons standing in the same position relatively to the law.

3.

That said Supreme Court erred in holding and deciding that said plaintiff in error is not denied the same protection of the laws, which is enjoyed by other persons or classes of persons in the same place and in like circumstances.

4.

That said Supreme Court erred in holding and deciding that there is a reasonable distinction and classification between the case of a convict undergoing a life sentence, and a convict undergoing a sentence for a period of years, which in all human probability
9 will exceed the term of natural life.

SAMUEL T. BUSH,
G. C. RINGOLSKY,
Attorneys for Defendant and Plaintiff in Error.

Endorsed: Crim. 1367, Original. In the Supreme Court of the United States. J. W. Finley, Defendant and Plaintiff in Error, *vs.* The People of the State of California, Plaintiff and Respondent in

Error. Assignment of Errors. Filed June 9, 1908. F. L. Caughey, Clerk, by C. C. Brown, Deputy. Samuel T. Bush and G. C. Ringolsky, Attorneys for Petitioner, 803-805 Claus Spreckels Bldg., San Francisco, California.

Order Allowing Writ.

Let a Writ of Error in the above entitled cause issue as prayed for in the Petition, the same to operate as a supersedeas according to the customs and laws of the United States, upon all matters in said Writ mentioned, the plaintiff in error to remain in the custody of the Warden of the State Prison of the State of California at Folsom in said State, and pending the final determination of said writ of error, the execution of said defendant is hereby stayed.

Dated June 9, 1908.

W. H. BEATTY,
Chief Justice of the Supreme Court of the State of California.

Endorsed: Crim. 1367, Original. In the Supreme Court of the State of California. The People of the State of California, Plaintiff and Respondent, *vs.* J. W. Finley, Defendant and Appellant. Petition for Writ of Error. Order Allowing Writ and Supersedeas. Filed June 9, 1908. F. L. Caughey, Clerk, by C. C. Brown, Deputy. Samuel T. Bush and G. C. Ringolsky, Attorneys for Petitioner, 803-805 Claus Spreckels Bldg., San Francisco, California.

10

Citation.

In the Supreme Court of the United States.

JAMES W. FINLEY, Appellant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent and Defendant in Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the People of the State of California, and to the Hon. James M. Gillett, Governor of the State of California, and to the Hon. Ulysses S. Webb, Attorney General of the State of California, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court to be holden at the City of Washington on the 7th day of August, 1908, next, pursuant to an order allowing a writ of error entered in the Clerk's office of the Supreme Court of the State of California, in that certain action Numbered 1367, in which J. W. Finley is appellant and plaintiff in error, and you are the respondent and defendant in error, to show cause, if any there be, why the final judgment rendered against the said appellant and

plaintiff in error, as in the said order allowing a writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Hon. W. H. Beatty, Chief Justice of the Supreme Court of the State of California this 2d day of July, 1908.

[SEAL.] W. H. BEATTY,
Chief Justice.

Due service of the foregoing citation and receipt of a copy thereof admitted this 6th day of July, 1908.

J. N. GILLETT,
Governor of the State of California.
U. S. WEBB,
Attorney General of the State of California.
H.

11 Endorsed: Original, Crim. 1367. Supreme Court United States. James W. Finley, Appellant and Plaintiff in Error, *vs.* The People of the State of California, Respondent and Defendant in Error. Citation. Filed July 18, 1908. F. L. Caughey, Clerk, by Erb, Deputy. Samuel T. Bush, G. C. Ringolsky, Attorneys for Appellant and Plaintiff in Error, 803-805 Claus Spreckels Bldg., San Francisco, California.

12 *Final Judgment of Supreme Court.*

In the Supreme Court of the State of California.

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,
vs.
J. W. FINLEY, Defendant and Appellant.

FEB. 13, 1908.

The judgment and order appealed from are affirmed.

HENSHAW, *J.*

ANGELLOTTI, *J.*
SHAW, *J.*
SLOSS, *J.*
LORIGAN, *J.*
BEATTY, *C. J.*
McFARLAND, *J.*

13 *Clerk's Certificate.*

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the foregoing Indictment, Demurrer to Indictment, Verdict of the Jury of Sacramento County, Judgment of the Superior Court of Sacramento County, Notice of Appeal, Assignment of Errors, Order Allowing Writ of Error, Citation, and Final Judgment of the Supreme Court of the State of

California, are each and all a full true and correct copy of the same on file in the office of the Clerk of the Supreme Court of the State of California, and which, together with the Original Writ of Error, comprise the complete Transcript of the Record to be transmitted to the Clerk of the Supreme Court of the United States in the case of James W. Finley, Appellant and Plaintiff in Error *versus* the People of the State of California, Respondent and Defendant in Error.

[Seal Supreme Court of California.]

F. L. CAUGHEY,
Clerk of the Supreme Court
of the State of California,
By I. ERB, *Deputy Clerk.*

14 Crim. No. 1367.

Bank.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent,
v.
J. W. FINLEY, Defendant and Appellant.

The appellant while undergoing a life sentence in the state prison at Folsom was indicted under section 246 of the Penal Code, tried upon the indictment, found guilty and the death penalty imposed. From the judgment and from the order denying his motion for a new trial he prosecutes this appeal.

The section of the code defining his crime is in the following language: "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death."

The principal contentions of the appellant, advanced in different forms, resolve themselves into two propositions, both going to the constitutionality and validity of section 246 of the Penal Code. The first of these propositions is that it denies to the defendant the equal protection of the law guaranteed by the XIVth amendment to the constitution of the United States. Second, that it contravenes the provisions of article I, section 11 of the constitution of this state declaring that all laws of a general nature should have a uniform operation.

As to the genesis and origin of this comparatively new section of our Penal Code, it has long been a part of judicial knowledge, of legislative knowledge, and, indeed of general knowledge that convicts in penal institutions, undergoing sentences for life, constitute a most reckless and dangerous class. The conditions of their sentences destroy their hopes and with the destruction of hope all bonds of restraint are broken and there follows a recklessness leading to brutal crimes. These crimes became the more frequent as the impotency of the law to mete out adequate pun-

15

ishment for them was discerned. They were crimes of violence committed not alone against fellow inmates, but upon the custodians, officers and guards of the institutions. The series of bloody and savage escapes and attempts to escape from the state prisons, which attempts were usually organized and headed by "life termers," form a part of the history of our state. Indeed, it is known at times that prison officials have deemed it wise to clothe the "life termers" in a characteristic garb, as a red shirt, that they might be the better watched throughout the day and the more readily picked out by the armed guards in cases of an emeute. Under this well recognized condition of affairs it seemed expedient to the legislature to meet the situation by the enactment of section 246 of the Penal Code.

It is upon the authority of the City of Pasadena *v.* Stimson, 91 Cal. 252, and the numerous cases of like import, declaring that class legislation must be based upon some natural, intrinsic, constitutional, reasonable distinction, or otherwise that it is in violation of section 11, of Article 1 of the constitution of this state, that the appellant argues against the validity of the code provision. In this regard his contention is that there is no reasonable distinction to be drawn between the case of a convict undergoing a life sentence as such, and one undergoing a sentence for a period of years which in all human probability will exceed the term of natural life. But there are valid reasons which justify the distinction. The "life termers" as has been said, while within the prison walls, constitute a class by themselves, a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual. As to a convict incarcerated for a term of years, his civic death ends with his imprisonment. The good con-
16 duct laws, whereby the term of imprisonment is shortened as to all other convicts, have no application to those undergoing a life sentence. Generally speaking, the crimes for which convicts suffer life sentences, are graver in their nature and give evidence of more abandoned and malignant hearts, than do the crimes of those undergoing sentence for years. And, finally, if the legislature sought to make the law applicable to convicts other than "life termers," the difficulty which it would experience in fixing the term of imprisonment to which it should apply gives evidence itself that there is a reasonable rational class distinction between the "life termer," and the convict under sentence for years. It is concluded, therefore, that the classification in question is not arbitrary, but is based upon valid reasons and distinctions.

Nor can it be said that the act in question is violative of the XIVth amendment of the constitution of the United States. This amendment means simply, that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes, in the same place and under like circumstances. (Bauman *v.* Lewis "(Missouri *v.* Lewis)," 101 U. S. 22, (25:299)). Paraphrasing the language of the Supreme Court of the United States in Moore *v.* Missouri, 159 U. S. 676, we cannot perceive that appellant was denied the equal protection of the laws, for every other person in like cases with him, and convicted as he has been, would be subjected to like punishment.

Defendant complains of the refusal of the court to give a requested instruction to the jury to the effect that they might render any one of four verdicts according to their conclusion from the evidence, viz: guilty as charged in the indictment, guilty of assault with a deadly weapon, guilty of simple assault and not guilty. There was no error in this action of the court. In view of the evidence as shown
17 by the record the defendant was either guilty as charged in the indictment, or not guilty at all, and the jury was charged that if the evidence did not satisfy them beyond a reasonable doubt that he was guilty of the offense charged, they must find him not guilty.

It is finally contended that the indictment is defective in failing to charge that the defendant was sentenced to life imprisonment in the state prison by a court of competent jurisdiction designating it. The indictment charged in the language of the code that the defendant was then and there a person confined in and undergoing a life sentence at the state prison. It was sufficiently specific to enable defendant to prepare his defense. It is plainly one of those crimes, which as to the matter in question, it is sufficient to charge in the language of the statute. (People *v.* O'Brien, 96 Cal. 174; People *v.* King, 126 Cal. 369.) Upon the trial the record of the commitment of the defendant to the state prison was offered and admitted in evidence over the objection of the defendant. This record was not only competent evidence, but the method adopted was the proper method of its presentation to the court. (People *v.* Williams, 39 South. 337.)

For these reasons the judgment and order appealed from are affirmed.

HENSHAW, *J.*

We concur:

ANGELLOTTI, *J.*
SHAW, *J.*
SLOSS, *J.*
LORIGAN, *J.*
BEATTY, *C. J.*
McFARLAND, *J.*

18 *Clerk's Certificate to Decision of Supreme Court.*

I, F. L. Caughey, do hereby certify that the foregoing decision rendered by the Supreme Court of the State of California, in the case of the People of the State of California, plaintiff and respondent *vs.* J. W. Finley, defendant and appellant, is a full, true and correct copy of said opinion on file in the Clerk's office of the Supreme Court of the State of California.

[Seal Supreme Court of California.]

F. L. CAUGHEY,
Clerk of the Supreme Court of the State of California,
By I. ERB, *Deputy Clerk.*

19 [Endorsed:] No. —. Dep't —. In the Supreme Court of the United States. James W. Finley, Plaintiff in Error, *vs.* The People of the State of California, Defendant in Error. Transcript of the Record. Samuel T. Bush, Attorney for Plaintiff in Error, Rooms 559-565 Monadnock Building, San Francisco.

20 In the Supreme Court of the United States.

J. W. FINLEY, Defendant and Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the State of California, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment which is in the Supreme Court of the State of California, before you, or some of you, being the highest Court of law and equity of the said State in which a decision could be had in the said action, between J. W. Finley, defendant and plaintiff in error, and the People of the State of California, plaintiff and respondent in error, wherein was drawn in question the validity of a statute of said State of California on the ground of its being repugnant to the Constitution and Laws of the United States, and the decision of said Supreme Court was in favor of such, its validity, a manifest error hath happened to the great damage of the said J. W. Finley, plaintiff in error, as by his petition, assignment of errors and the record herein appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the
21 record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States together with this Writ, so that you may have the same at Washington on the 7th day of August, 1908, next, in the said Supreme Court that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of June, 1908.

[Seal U. S. Circuit Court, Northern Dist. Cal.]

SOUTHARD HOFFMAN,
Clerk U. S. Circuit Court,
Northern District of California,
By J. A. SCHAERTZER, *Deputy Clerk.*

Allowed, June 9th, 1908.
W. H. BEATTY,
Chief Justice of the Supreme Court
of the State of California.

Due service of the foregoing writ of error and receipt of a copy thereof admitted this 6th day of July, 1908.

J. N. GILLETT,
Governor of the State of California.

Due Receipt of a copy of the within is admitted this 10th day of July, 1908.

U. S. WEBB,
Attorney General,
By L. HERZOG.

22 [Endorsed:] Crim. 1367. Original. In the Supreme Court of the United States. J. W. Finley, Defendant and Plaintiff in Error, *vs.* The People of the State of California, Plaintiff and Respondent in Error. Writ of error. Filed Jun- 9, 1908. F. L. Caughey, Clerk, by C. C. Brown, Deputy. Samuel T. Bush and S. C. Ringolsky, Attorneys for Petitioner, 803-805 Claus Spreckels Bldg., San Francisco, California.

23 In the Supreme Court of the United States.

JAMES W. FINLEY, Appellant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Respondent and Defendant in Error.

Citation.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the People of the State of California, and to the Hon. James M. Gillett, Governor of the State of California, and to the Hon. Ulysses S. Webb, Attorney General of the State of California, Greeting:

You are hereby cited and admonished to be and appear at the United States Supreme Court to be holden at the City of Washington on the 7th day of August, 1908, next pursuant to an order al-

lowing a writ of error entered in the Clerk's office of the Supreme Court of the State of California, in that certain action Numbered #1367 in which J. W. Finley is appellant and plaintiff in error, and you are the respondent and defendant in error, to show cause, if any there be, why the final judgment rendered against the said appellant and plaintiff in error, as in the said order allowing a writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Hon. W. H. Beatty, Chief Justice of the Supreme Court of the State of California this 2nd day of July, 1908.

[Seal Supreme Court of California.]

W. H. BEATTY,
Chief Justice.

24 Due service of foregoing citation and receipt of a copy thereof admitted this 6th day of July 1908.

J. N. GILLETT.
Governor of the State of California.
U. S. WEBB,
Attorney General of the State of California.
H.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Original Citation in Crim. No. 1367, James W. Finley, Appellant and Plaintiff in Error, *versus* The People of the State of California, Respondent and Def't in Error, as shown by the records of my office.

Witness my hand and the seal of the Court, this 3d day of August, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy Clerk.*

25 [Endorsed:] Crim. 1367, Original. Supreme Court, United States. James W. Finley, Appellant and Plaintiff in Error, *vs.* The People of the State of California, Respondent and Defendant in Error. Citation. Filed Jul- 18, 1908. F. L. Caughey, Clerk, By Erb, Deputy. Samuel T. Bush, G. C. Ringolsky, Attorneys for Appellant and Plaintiff in Error, 803-805 Claus Spreckels Bldg., San Francisco, California.

26 In the Supreme Court of the United States.

J. W. FINLEY, Defendant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent in Error.

Assignment of Errors.

The defendant and plaintiff in error files the following Assignment of Errors upon which he will rely and prosecute a Writ of Error in the above entitled cause:

That the Supreme Court of the State of California erred in holding and deciding

1.

That section 246 of the Penal Code of the State of California does not contravene and violate section 1 of the 14th Amendment of the Constitution of the United States.

2.

That the said Court erred in holding and deciding that said section 246 of said Penal Code does not make an arbitrary classification of persons standing in the same position relatively to the law.

3.

That said Supreme Court erred in holding and deciding that said plaintiff in error is not denied the same protection of the laws, which is enjoyed by other persons or classes of persons in the same place and in like circumstances.

4.

27 That said Supreme Court erred in holding and deciding that there is a reasonable distinction and classification between the case of a convict undergoing a life sentence, and a convict undergoing a sentence for a period of years, which in all human probability will exceed the term of natural life.

SAMUEL T. BUSH,
G. C. RINGOLSKY,
Attorneys for Defendant and Plaintiff in Error.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Original Assignment of Errors in Crim. 1367, James W. Finley, appellant and Plaintiff in Error *versus* The People of the State of California, Respondent and Defendant in Error as shown by the records of my office.

Witness my hand and the seal of the Court, this 3d day of August, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy Clerk.*

28 [Endorsed:] Crim. 1367, Original. In the Supreme Court of the United States. J. W. Finley, Defendant and Plaintiff in Error, *vs.* The People of the State of California, Plaintiff and Respondent in Error. Assignment of Errors. Filed Jun- 9, 1908. F. L. Caughey, Clerk, by C. C. Brown, Deputy. Samuel T. Bush and G. C. Ringolsky, Attorneys for Petitioner, 803-805 Claus Spreckels Bldg., San Francisco, California.

29 In the Supreme Court of the United States.

J. W. FINLEY, Defendant and Plaintiff in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Defendant in Error.

Prayer for Reversal.

J. W. Finley, Plaintiff in Error, prays for a judgment of reversal by this Honorable Court of the final judgment rendered by the Supreme Court of the State of California, in the case of the People of the State of California, Plaintiff, *versus* J. W. Finley, defendant, as of record appears in this cause, and as a basis for this prayer for reversal, respectfully urges the grounds set forth in his Assignment of Errors, filed and of record herein.

SAMUEL T. BUSH,
Attorney for Plaintiff in Error.

I, F. L. Caughey, Clerk of the Supreme Court of the State of California, do hereby certify that the preceding and annexed is a true and correct copy of Original Prayer for Reversal in Crim. No. 1367, James W. Finley, Appellant and Plaintiff in Error, *versus* The People of the State of California, Respondent and Defendant in Error, as shown by the records of my office.

Witness my hand and the seal of the Court, this 3d day of August, A. D. 1908.

[Seal Supreme Court of California.]

F. L. CAUGHEY, *Clerk,*
By I. ERB, *Deputy Clerk.*

30 [Endorsed:] No. Crim. 1367. Dept. —. In the Supreme Court of the United States. J. W. Finley, Plaintiff in Error, *vs.* The People of the State of California, Defendant in Error. Prayer for Reversal. Filed July 18, 1908. F. L. Caughey, Clerk, By I. Erb, Deputy. Samuel T. Bush, Attorney for Plaintiff in Error, 559-565 Monadnock Building, S. F.

Endorsed on cover: File No. 21,543. California supreme court. Term No. 747. James W. Finley, plaintiff in error, *vs.* The People of the State of California. Filed March 10th, 1909. File No. 21,543.

ABSTRACT.

Plaintiff in error was proceeded against under section 246 of the Penal Code of the State of California and, after conviction, sentenced to death. Upon appeal to the Supreme Court of the State the judgment was affirmed. Throughout it was contended that this section is inhibited by article XIV of the Federal Constitution. The decision was in favor of the validity of the statute and the cause, involving this sole contention, is regularly before this Court on writ of error to the Supreme Court of the State of California.

Transcript, p. 7;
People vs. *Finley*, 153 Cal. 59;
Sec. 709, U. S. Rev. Stats.;
Sec. 49, Code Civ. Proc.;
Gross vs. *U. S. Mortgage Co.*, 108 U. S. 427;
Philadelphia Fire Association vs. *New York*, 119 U. S. 110.

I. While the law with reference to classification within the constitutional meaning is well settled, the application thereof gives rise to question.

Yick Wo vs. *Hopkins*, 118 U. S. 356;
Barbier vs. *Connolly*, 113 U. S. 27;
Board of Education vs. *Alliance Assurance Co.*, 159 Fed. 994.

II. It is necessary to ascertain the reason and purpose of the statute to determine its validity.

a. The rapid and beneficent advance of penal reform necessitates the conclusion that no trivial reason prompted or should be held to have prompted the statute.

Boies, Science of Penology, 119.

b. The legislature did not base the statute upon the ground that life termers are more dangerous than other prisoners.

People vs. *Finley*, 153 Cal. 59, *contra*.

1. The term of imprisonment is determined by influences other than personal character.

Drahms, The Criminal, 364;
Ex parte Mallon, 16 Idaho, 737, 102 Pac. 374.

2. Life termers are not desperate because of the loss of all hope of freedom, since the parole law of California supplies ample relief.

3. Permanent loss of civil rights as compared with a temporary loss thereof does not make the life termer more dangerous than his fellow convict.

c. A law predicated on length of term is unconstitutional.
Ex parte Mallon, 16 Idaho, 737, 102 Pac. 374;

State vs. *Lewin*, 53 Kan. 679, 37 Pac. 168.

d. The only possible reason for the enactment of the statute is a seeming lack of adequate punishment for life termers.

III. The classification necessary to support a statute must be based upon REAL differences in the situation, condition and tendencies of things.

Ho Ah Kow vs. *Nunan*, 5 Sawyer 552;
Gulf etc. Ry. Co. v. *Ellis*, 165 U. S. 150;
Cotting vs. *Kansas City Stock Yards*, 183 U. S. 79;
Connolly vs. *Union Sewer Pipe Co.*, 184 U. S. 540;
Board of Education vs. *Alliance Assurance Co.*, 159 Fed 994;
State vs. *Loomis*, 115 Mo. 307, 22 S. W. 350;
State vs. *Miksicek*, 125 S. W. 506, Mo. 1910;
State vs. *Mitchell*, 97 Me. 66, 73;
State vs. *Julow*, 129 Mo. 163, 31 S. W. 781, at 783;
State vs. *Thomas*, 138 Mo. 95; 39 S. W. 481;
Murray vs. *Board of Commissioners*, 81 Minn. 359, 84 N. W. 103;
Nichols vs. *Walter*, 37 Minn 264, 33 N. W. 800;
People vs. *Van De Carr*, 86 N. Y. S. 644;
Jones vs. *C. R. Railway Co.*, 231 Ill. 302, 308;
State vs. *Wright*, 53 Ore. 344, 100 Pac. 296;
State vs. *Hammer*, 42 N. J. L. 435;
In re Van Horne, 74 N. J. E. 600, 70 Atl. 986;
Gillespie vs. *People*, 64 N. E. 533, Illinois;
Phipps vs. *Wis. Cent. Ry. Co.*, 133 Wis. 153, 143 N. W. 456;
Johnson vs. *City of Milwaukee*, 88 Wis. 383, 60 N. W. 270;
Sutton vs. *State*, 96 Tenn. 694, 36 S. W. 697;
State vs. *Goodwill*, 33 W. Va. 179.

a. The statute does not meet constitutional tests. There is no inherent difference between the life termer and the middle-aged long termer.

Report State Board Prison Directors, 1909-10, 69 and 185; 70 and 184.

b. Owing to the condition of the California law, certain prisoners are, with reference to immunity from punishment, in the same position as life termers.

Sec. 669, Code Civ. Proc.;
Sec. 245, Penal Code;
Ex parte Morton, 132 Cal. 346;
Sec. 667, Penal Code.

c. The statute should be viewed from a broad position. It is unequal, special and discriminatory and unconstitutional.

SPECIFICATION OF ERRORS.

The Supreme Court of the State of California erred in holding that section 246 of the Penal Code of the State of California is not inhibited by article XIV of the Constitution of the United States, section 1 thereof reading as follows: "Nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

No. 21543.

IN THE

Supreme Court of the United States

October Term, 1908.

No. 747.

JAMES W. FINLEY,
Plaintiff and Appellant in Error,
vs.
THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant and Respondent in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

Plaintiff in error was, after indictment returned, tried, convicted and sentenced to death under section 246 of the Penal Code of the State of California. The section reads as follows:

> "Every person undergoing a life sentence in a state prison of this state, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury is punishable with death."

Upon appeal the judgment was affirmed by the ultimate State tribunal. (*People* vs. *Finley*, 153 Cal. 59.) Thereafter the cause was brought here upon writ of

error to the Supreme Court of the State of California.

The question for review here is whether section 246, *supra,* is violative of the Fourteenth Amendment to the Constitution of the United States.

This question was duly presented to the State Court and the decision was in favor of the validity of the statute.

Transcript, p. 7;
People vs. *Finley,* 153 Cal. 59;
Sec. 709, U. S. Rev. Stats.

To ascertain that the Federal question was properly raised and that this Court has jurisdiction of the cause, the decision of the Supreme Court of the State of California is entitled to consideration.

*Sec. 49, Code Civ. Proc.;

Gross vs. *U. S. Mortgage Co.,* 108 U. S. 427;
Phila. Fire Association vs. *New York,* 119 U. S. 110.

The opinion amply shows that one of the "principal "contentions of the appellant" (Trans., p. 8), the plaintiff in error here, was that the section in question is inhibited by article XIV of the Federal Constitution, and that this contention was overruled.

The rules governing classification within the meaning of the equal protection clause of the Amendment are settled beyond dispute. It is their application only, in the judicial process of inclusion and exclusion, that gives rise to question.

---

*"In the determination of causes, all decisions of the Supreme Court in bank, or in departments shall be given in writing, and the grounds of the decision shall be stated."

Barbier vs. *Connolly*, 113 U. S. 27, 31;
Yick Wo vs. *Hopkins*, 118 U. S. 356;
Board of Education vs. *Alliance Assurance Co.*, 159 Fed. 994, 999.

The classical language upon the subject is found in *Barbier* vs. *Connolly, supra.*

> "The fourteenth amendment . . . undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights . . . that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses."

A recent decision (*Board of Education* vs. *Alliance Assurance Co., supra*) gives the following summary of the entire law upon the subject found in the decisions:

> "An act applying uniformly to the whole of any single class of individuals or objects, where the classification is founded upon some natural intrinsic or constitutional distinction, is a general law. In order to make the law general, the classification must not be arbitrary, but must be founded upon some natural intrinsic or constitutional distinction, and some reason must appear why the act is not made to apply generally to all classes. Although a law is general when it applies equally to all individuals of a class founded upon a natural intrinsic or constitutional distinction, it is not general if it confers particular

> privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right upon a class arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law. . . . It is held that the mere fact that the class is founded on some intrinsic difference does not necessarily justify a special rule. There must be some relation between the difference in class and the difference in the rule of practice involved."

To determine whether the statute involved meets the broad yet exacting terms of constitutional requirements, regard must be had to the reason and purpose of its enactment.

The statute is anomalous in the history of modern penal legislation. The marked tendency of the law is to diminish capital punishment—not to increase it. From the early part of the nineteenth century when death was a frequent punishment—and crime was rife—a large advance has been made in penal reform.

In response to this movement Colorado, Maine, Michigan, Rhode Island and Wisconsin, as well as a number of European and South American countries, have abolished the death penalty and a number of jurisdictions in the Union have substantially decreased the number of offenses thus punishable. In the community at large there exists a strong and ever increasing sentiment against "judicial murder." (Boies, Science of Penology, 119.) The California statute is the only retrogression—the only step backward in a beneficent advance.

No trivial reason could prompt this exceptional

statute. In view of the rapidity and deep seated character of penal reform, the Legislature must have had in mind some broad, substantial ground for the act. They could not otherwise justify it. The Legislature, therefore, did not base the statute on the ground that life termers *per se* are a more dangerous class than other prisoners. That ground is narrow and not founded in fact.

People vs. *Finley,* 153 Cal. 59, *contra.*

The term of years to which a convict is subjected is not determined exclusively by his character or the menace he offers to society. His habits do not determine the length of his term. In fixing punishment there are additional elements of equally serious consideration. He must be taught a lesson, an example must be made of him as a warning to the criminal world, the crime must be expiated and respect for law maintained. The gravity of the offense is often of controlling influence. To these considerations rather than to the mere character of the man, his term of imprisonment is more often referable. (Drahms, The Criminal, 364.) Indeed, a man's character and habits are seldom known at the time of sentence. The law itself classifies punishment according to the gravity of the offense, except in the case of habitual criminals, where the classification rests, not upon the dangerous and desperate character of the criminal, but upon the recurrence of his criminality. The Penal Code establishes punishment for crimes, but no systematic provision for individual cases. The mere fact therefore that a person is serving a long term, is not evidence that he is

more dangerous to society than a person serving a shorter term.

Ex parte Mallon, 16 Idaho, 737, 102 Pac. 374, 376.

To base the statute upon the ground that life termers are more dangerous than their fellow prisoners, is to declare a violent presumption. The Legislature cannot prophesy that all life termers hereafter to be committed are the most dangerous to society, neither can it assure that courts, in passing sentence, will consider only habit of mind and character. A life termer is not necessarily any more depraved or desperate than any other prisoner. His term is not based upon his lack of moral fibre. The California Penal Code contains numerous provisions authorizing imprisonment for life as a maximum punishment. However, the convict incarcerated for two years, the limit for an assault with a deadly weapon, may be more abandoned and vicious than the robber serving life.

In view of the fact that physical and mental qualities produce criminality, the term of imprisonment in itself does not differentiate convicts in respect to viciousness. The length of a term may embitter, but never mollify savage instincts. The desperate man is not the less desperate because he serves a short term.

It has been urged that life termers become abandoned and desperate through loss of all hope of freedom, that other prisoners are encouraged to proper conduct by the credit system, and that upon these differences the statute is well founded.

People vs. *Finley,* 153 Cal. 59.

This theory is without support in fact. A parole law of broad proportions furnishes equal if not greater hope to life termers

*Stats. California, 1901, p. 82.

‡Rule V. Rules and regulations for paroling prisoners. (California State Board of Prison Directors.)

†Rule IX. Rules and regulations for paroling prisoners. (*Ibid.*)

Under these laws, a life termer may be paroled after eight years. The fact is, that with 173 life termers incarcerated in the California State Prison at San Quentin, 38 life termers are upon parole.

Report State Board of Prison Directors, 1910, p. 73.

Both classes are inspired to good conduct by laws framed to that end. If their rights are lost, no relative change in position takes place. Both are punished, retaining the right again to take advantage of parole and credit laws.

---

*Section 1. The State Board of Prison Directors of this State shall have power to establish rules and regulations under which any prisoner who is now or hereafter, may be imprisoned in any State Prison and who may have served one calendar year of the term for which he was convicted and who has not previously been convicted of a felony and served a term in a penal institution, may be allowed to go upon parole * * * provided that no prisoner imprisoned under sentence of life, shall be paroled until he shall have served at least 7 calendar years.

‡Half term must be served.

No application for parole shall be filed by the clerk until the prisoner shall have served one-half his sentence. * * *

†Life termers and those who shall have served 8 years solid time, shall be placed upon a separate calendar and their application shall be considered in the order in which they are filed with the Clerk.

Mere loss in civil rights has no impress upon character. A total loss of the right to participate in government, as compared with a temporary loss thereof, is absolutely without influence in producing desperate and depraved spirits. This difference could not support the statute. It is as idle a distinction as the typical example of a difference in complexion.

People vs. *Finley*, 153 Cal. 59, 62, *contra.*

The undisputed facts are to the contrary of the unreasonable hypothesis that life termers are more dangerous than other criminals. As a rule, they are among the better class of prisoners. They soon become reconciled to their lot. They realize that unless paroled or pardoned they are incarcerated till death. The convict of mature years serving a long term, practically a life termer, knows that his credits are of no avail; that if he lives the period of his term, he will leave prison an aged man, without trade, means or physical powers. He becomes the dangerous man. He is the dangerous man.

The statute would not be valid if predicated upon this ground. Punishment based on the length of term is unequal and inhibited.

Ex parte Mallon, 16 Idaho, 737, 102 Pac. 374;
State vs. *Lewin,* 53 Kan. 679, 37 Pac. 168.
In re Cook, 13 Cal. App. 399.

The statute held invalid in the Mallon case, *supra,* based punishment for an escape upon the length of the term being served.

The Court said, page 376:

> "While the legislature in preventing and fixing punishment for crime has very great latitude in classifying the same, still the rule is well recognized that in making such classification it should be natural, and not arbitrary, and should be made with reference to the heinousness or gravity of the act or acts made a crime, and not with reference to matters disconnected with the crime."

The statute which is cited with emphasis in *In re Finley,* 1 Cal. App. 198, at page 209, and which is there declared to present the "strongest analogy" to Section 246, Penal Code, the section now attacked, has since that decision been declared unconstitutional.

In re Cook, 13 Cal. App. 399.

The term of a prisoner has no relation to the gravity of an offense. Basing the statute purely upon that ground would render it, as in the cases cited, unconstitutional. The classification has no reasonable relation to the purposes of the statute.

If the Legislature had intended to fix a punishment for crimes committed by life termers on the theory that they are the most dangerous class of prisoners, it would have applied the statute in question to assaults with intent to commit murder, escapes, robberies and other felonies.

We must seek a broader ground for legislative action in passing this repressive and harsh statute—a ground that appears upon its face. It proceeds on the proposition that since life termers are no longer subject to adequate punishment, they must therefore be punished with death for an assault with a deadly weapon. That

presents the only possible reason for the discrimination. Neither length of term nor criminal character, but lack of punishment is the predicate of the statute under attack.

Ex parte Finley, 1 Cal. App. 202.

The Court, in this case, maintains this conclusion in the following language:

> "Through his own misconduct, such (life) convict has forever forfeited his liberty and has suffered civil death. The only remaining right or privilege he can forfeit is his physical life. The limit of ordinary punishment has been reached; and if this only remaining penalty cannot be inflicted, then such convict stands immune from further human retribution."

With the reason and purpose thereof established, the statute may be subjected to constitutional tests. Questions of classification, and the operation and effect of a statute with reference to things classified, are considered by the courts in a thoroughly practical light. If, in this view the statute takes no cognizance of prisoners in like situation as the life termer with reference to the purpose of the act, it is invalid.

The authorities hold that the Legislature, in distinguishing those included and excluded must base the statute upon real, substantial differences. The distinctions contemplated in dealing with questions of class legislation are not those that exist in name only. The label is not conclusive. Calling persons by a class name, designating the thing classified by a generic, general term, is not sufficient. The law contemplates distinc-

tions founded in actual practice, and practical, subsisting differences. It is not a possible difference that removes a statute from the constitutional inhibition. If that were so, every classification would be proper, because some slight reason can always be found for distinctions made. A seeming distinction, or theoretical difference does not suffice. The distinction must be actual—the line of division must exist in fact.

Ho Ah Kow vs. *Nunan,* 5 Sawyer, 552;
Gulf etc. Ry. Co. vs. *Ellis,* 165 U. S. 150;
Cotting vs. *Kansas City Stock Yards,* 183 U. S. 79;
Connolly vs. *Union Sewer Pipe Co.,* 184 U. S. 540;
Board of Education vs. *Alliance Assurance Co.,* 159 Fed. 994;
State vs. *Loomis,* 115 Mo. 307, 22 S. W. 350;
State vs. *Miksicek,* 125 S. W. 506, Mo. 1910.
State vs. *Mitchell,* 97 Me. 66, 73;
State vs. *Julow,* 129 Mo. 163, 31 S. W. 781, at 783;
State vs. *Thomas,* 138 Mo. 95, 39 S. W. 481;
Murray vs. *Board of Commissioners,* 81 Minn. 359, 84 N. W. 103;
Nichols vs. *Walter,* 37 Minn. 264, 33 N. W. 800;
People vs. *Van De Carr,* 86 N. Y. S. 644;
Jones vs. *C. R. Railway Co.,* 231 Ill. 302, 308;
State vs. *Wright,* 53 Ore. 344, 100 Pac. 296;
State vs. *Hammer,* 42 N. J. L. 435;
In re Van Horne, 74 N. J. E. 600, 70 Atl. 986;
Gillespie vs. *People,* 64 N. E. 533, Illinois;
Phipps vs. *Wis. Cent. Ry. Co.,* 133 Wis. 153, 143 N. W. 456;

Johnson vs. *City of Milwaukee,* 88 Wis. 383, 60 N. W. 270;
Sutton vs. *State,* 96 Tenn. 694, 36 S. W. 697;
State vs. *Goodwill,* 33 W. Va. 179.

The following quotations from the cases cited point to the marked emphasis that courts have laid upon the practical consideration of this subject. (The italics in the quotations are ours.)

> "These differentiations or classifications must be reasonable and based upon *real differences* in the situation, condition and tendencies of things."
>
> *State* vs. *Mitchell,* 97 Me. 66, 71.

The statute involved in that case discriminated between persons paying twenty-five dollars a year taxes on a stock in trade and those paying less, exempting the former from the payment thereof, while requiring the latter to pay them. The discrimination was held invalid.

> "Plainly, a law may be general in its provisions and may apply to the whole of a group of objects having characteristics sufficiently marked and important to make them a class by themselves, and yet such law may be in contravention of this constitutional prohibition. . . . But the true principle requires something more than a mere designation by such characteristics as will serve to classify, for the characteristics which thus serve as the basis of classification, must be of such a nature as to make the objects so designated as peculiarly requiring exclusive legislation. There must be ***substantial distinction,*** having a reference to the

subject matter of the proposed legislation, between the objects or places embraced in such legislation and the objects or places excluded."

State vs. *Hammer,* 42 N. J. L. 435, 440.

"All classification must be based upon *substantial distinctions* which make one class *really* different from another. . . . The classification adopted must be germane to the purpose of the law."

Johnson vs. *The City of Milwaukee,* 88 Wis. 383, 390.

"When a law is made applicable only to one class of individuals, however, there must be some actual, substantial difference between the individuals so classified and other individuals in the state or community, when considered with reference to the purposes of the legislation."

Jones vs. *The Chicago etc. Railway Co.,* 231 Ill. 302, 308.

In the light of these cases the statute fails. There is no inherent difference between a life termer and a man whose term covers his life, who enters at the age of 40 or 50 years, for a term of fifty or more years. There are convicts in the California penitentiaries undergoing terms ranging from forty to ninety-nine years. In 1910 there were 57 such. (Report State Board of Prison Directors, 1909-10, pp. 69 and 185.) In the same year 300 prisoners were committed whose ages ranged from 50 to 81 years. (pp. 70 and 184.) In spite of a proper deduction for credits, the terms of many of these men

easily reach far beyond the average or possible length of life. Is not the convict committed at age fifty, for sixty or seventy years, a life termer?

The long termer is in the same relation to the purpose of the act as the life termer. No substantial or practical or real difference can be pointed out in their situations. The act includes one, excludes the other. It therefore is invalid.

In addition, however, there is a large and growing class of convicts, who, by virtue of a recognized defect in the California law, cannot be punished for an assault with a deadly weapon with malice aforethought.

A sentence imposed for a conviction had subsequent to a prior sentence must run concurrently with the first sentence imposed.

*Sec. 669, Penal Code;
Ex parte Morton, 132 Cal. 346;
Ex parte McGuire, 135 Cal. 339, at p. 343;
Ex parte Casey, 42 Cal. Dec. 65 (July 11, 1911).

At the time of the passage of section 246 of the Penal Code, the largest penalty that could be imposed for an assault with a deadly weapon, was ten years (with or without malice aforethought), when a prior conviction was charged.

---

*When any person is convicted of two or more crimes before sentence has been pronounced upon him for either, the imprisonment to which he is sentenced upon the second or other subsequent conviction must commence at the termination of the first term of imprisonment to which he shall be adjudged . . .

†Sec. 245, Penal Code;
**Sec. 666, Penal Code, 1907.

This sentence must run concurrently with the one being served, owing to the defective condition of the statute, as admitted in the Morton case.

Sec. 669, Penal Code;
Ex parte Morton, 132 Cal. 346.

It follows that a convict serving a long term of years is immune from punishment for a considerable period. If the offense was committed during the first ten years of a twenty-year term, the punishment imposed, namely, ten years, runs concurrently with the prior sentence and expires without having lengthened the term. The offender goes unpunished for his crime. During the first ten years of his term, therefore, he was as immune from punishment for an assault with a deadly weapon as a life termer.

Under the law as it existed upon the adoption of the statute the following table shows the period during

---

†Every person who commits an assault upon the person of another with a deadly weapon . . . is punishable by imprisonment in the state prison, or in a county jail, not exceeding two years.

**Every person, who, having been convicted of petty larceny, or of any offense punishable by imprisonment in the state prison, commits any crime after such conviction, is punishable therefor as follows:

. . . .

2. If the offense of which such person is subsequently convicted is such, that, upon a first conviction, the offender would be punishable by imprisonment in the state prison for five years, or any less term, the person convicted of such subsequent offenses is punishable by imprisonment in the state prison not exceeding ten years.

which certain prisoners were immune from punishment, and for that reason, in the same position to the purposes of the act as a life termer.

Length of Term.	*Period of Immunity.*
20 years	10 years
25 "	15 "
30 "	20 "
40 "	30 "
50 "	40 "

At the session of 1909, the Legislature enacted section 667* of the Penal Code and by amending section 666 so that it now applies only to persons convicted of petty larceny made the condition more glaring than theretofore. The second offense is now punishable with imprisonment for two years (Section 245, Penal Code, Section 667, Penal Code), the maximum of an assault with a deadly weapon. The period of immunity therefore extends over the entire term of a prisoner except the last two years thereof. It affects almost the entire prison population and the discrimination is more extensive by reason of the new section. It results, therefore, that if two convicts, one a life termer, commit an assault with a deadly weapon, one is hanged, the other is not punished.

*Every person who, having been convicted of any offense punishable by imprisonment in the state prison, and having served a term therefor in any penal institution, commits any crime after such conviction, is punishable therefor as follows:

1. If the offense of which such person is subsequently convicted is such that, upon a first conviction an offender would be punishable by imprisonment in the state prison, such person is punishable by imprisonment in the state prison, for the maximum period for which he might have been sentenced, if such offense had been his first offense.

Sec. 246, Penal Code;
Ex parte Mallon, 132 Cal. 346.

For these periods of immunity from punishment, the long termers have been, and even the short termers now are in the exact position of life termers. Long termers and life termers and convicts within the years of immunity form a class by themselves—distinguished by freedom from adequate punishment for the offense embraced in the statute. If this characteristic requires classification, the Legislature must include all having the same characteristic, and exclude all who, by their natural and inherent position, are within the basis of the classification. The Legislature cannot arbitrarily create a class—it must legislate for a class already in existence.

Habitual criminal statutes furnish no analogy upon which to determine the present question. Those statutes were primarily attacked on the theory that they were *ex post facto.*

Moore vs. *Missouri,* 159 U. S. 676;
People vs. *Coleman,* 145 Cal. 613.

That contention is not suggested here. It is urged here that equal protection of the laws is denied, and with reference to the classification under this constitutional provision, each statute must be determined upon the nature and facts of the particular selection attempted to be made by it.

Plaintiff in error urges this Court to take a broad ground in determining the relationship between section 246 of the Penal Code of the State of California and

the Fourteenth Amendment to the Constitution of the United States. The statute is unequal in character, special and discriminatory in its effects. A clear view of the actual facts determines these effects and stamps it unconstitutional and inhibited. The label cannot conclude the judgment or alter the facts.

The statute is unworthy of an enlightened commonwealth. It provides awful retribution without justification. It rankles with unholy vengeance. We submit that it must be held inhibited by the Fourteenth Amendment to the Constitution of the United States.

Respectfully submitted.

G. C. RINGOLSKY,
Attorney for Plaintiff in Error.

H. G. W. Dinkelspiel.

No. 15

FILED.

OCT 9 1911

JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911

JAMES W. FINLEY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

No. 15

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF OF PLAINTIFF IN ERROR.

(By SAMUEL T. BUSH, of Counsel.)

C. C. CALHOUN,
JAMES N. SHARP,
Attorneys for Plaintiff in Error.

Filed this ..... day of October, 1911.

.....*Clerk.*

By .....*Deputy Clerk.*

IN THE

SUPREME COURT

OF THE

UNITED STATES

JAMES W. FINLEY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

Plaintiff in error was indicted by the Grand Jury of the County of Sacramento, State of California, for an assault with a deadly weapon with malice aforethought, as defined by Section 246 of the Penal Code of the State of California, which reads as follows:

"Every person undergoing a life sentence in a state prison of this state who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death."

Thereafter, defendant Finley was duly tried by a jury and convicted of the offence charged in the indictment and was subsequently duly and regularly sentenced to suffer the death penalty. Thereupon and thereafter, defendant duly perfected an appeal to the Supreme Court of the State ~~of State~~ of California, which appeal was regularly heard and determined and the judgment of the Superior Court of said Sacramento County was thereupon affirmed. Plaintiff in error thereafter duly and regularly applied for a Writ of Error to the Supreme Court of the United States, which application was granted.

Plaintiff in error filed his assignment of errors as follows:

(1) That the Supreme Court of the State of California erred in holding and deciding that Section 246 of the Penal Code of the State of California does not conflict with and violate Section 1 of the Fourteenth Amendment of the Constitution of the United States.

(2) That the said Court erred in holding and deciding that said Section 246 of the Penal Code does not make an arbitrary classification of persons standing in the same position relatively to the law.

(3) That said Supreme Court erred in holding and deciding that said plaintiff in error is not denied the

same protection of the laws which is enjoyed by other persons or classes of persons in the same place and in like circumstances.

(4) That said Supreme Court erred in holding and deciding that there is a reasonable distinction and classification between the case of a convict undergoing a life sentence and a convict undergoing a sentence for a period of years, which in all human probability will exceed the term of natural life.

The entire attack made by plaintiff in error on the Statute in question and on the decision of the Supreme Court of the State of California affirming the judgment of the Superior Court of said Sacramento County, and upholding the constitutionality of Section 246 of the Penal Code, involves the interpretation of Section 1 of the Fourteenth Amendment to the Constitution of the United States and its applicability to said Section 246 of said Penal Code.

Accordingly, the four specifications of error all call in question the constitutionality of the Statute under which the defendant was convicted and sentenced and may be converged and consolidated into one common proposition, namely, that the Statute establishes an unreasonable distinction and discrimination between certain classes of persons standing in the same relation to the law and in the same position relatively, creating thereby what is commonly known as class legislation, and particularly that no reasonable distinction can be

drawn between a life term prisoner and a long term prisoner so far as the intent and purposes of this Statute are concerned.

The opinion of the Supreme Court of the State of California affirming the judgment of the lower Court, to which we desire to give special consideration, reads as follows:

> "As to the genesis and origin of this comparatively new section of our Penal Code, it has long been a part of judicial knowledge, of legislative knowledge, and, indeed ,of general knowledge, that convicts in penal institutions, undergoing sentences for life, constitute a most reckless and dangerous class. The conditions of their sentences destroy their hopes, and with the destruction of hope all bonds of restraint are broken and there follows a recklessness leading to brutal crimes. These crimes became the more frequent as the impotency of the law to mete out adequate punishment for them was discerned. They were crimes of violence committed not alone against fellow inmates, but upon the custodians, officers and guards of the institutions. The series of bloody and savage escapes and attempts to escape from the State prisons, which attempts were usually organized and headed by 'life-termers', form a part of the history of our State. Indeed it is known, that at times the prison officials have deemed it wise to clothe the 'life-termers' in a characteristic garb, as a red shirt, that they might be the better watched throughout the day and the more readily picked out by the armed guards in cases of an emeute. Under this well-recognized condition of affairs it seemed expedient to the Legislature to meet the situation by the enactment of Section 246 of the Penal Code.
>
> "It is upon the authority of the City of Pasadena vs. Stimson, 91 Cal. 252 (27 Pac. 604), and the numerous

cases of like import, declaring that class legislation must be based upon some natural, intrinsic, constitutional, reasonable distinction, or otherwise that is in violation of Section 11 of Article I of the Constitution of this State, that the appellant argues against the validity of the code provision. In this regard, his contention is that there is no reasonable distinction to be drawn between the case of a convict undergoing a life sentence as such, and one undergoing a sentence for a period of years, which in all probability will exceed the term of natural life. But there are valid reasons which justify the distinction. The 'life-termers', as has been said, while within the prison walls, constitute a class by themselves, a class recognized by penologists the world over. Their situation is legally different. Their civic death is perpetual. As to a convict incarcerated for a term of years, his civic death ends with his imprisonment. The good-conduct laws, whereby the term of imprisonment is shortened, as to all other convicts, have no application to those undergoing a life sentence. Generally speaking, the crimes for which convicts suffer life sentences are graver in their nature and give evidence of more abandoned and malignant hearts than do the crimes of those undergoing sentence for years. And, finally, if the Legislature sought to make the law applicable to convicts other than 'life-termers', the difficulty which it would experience in fixing the terms of imprisonment to which it should apply gives evidence itself that there is a reasonable rational class distinction between the 'life-termer' and the convict under sentence for years. It is concluded, therefore, that the classification in question is not arbitrary, but is based upon valid reasons and distinctions."

The decision in question, from its tenor, imports that those convicts commonly known as "life-

termers'' justify a distinction which is reasonable, intrinsic, natural and constitutional as compared to long term prisoners, and special legislation may be enacted for the purpose of punishing that class. In order that we may demonstrate the erroneous conclusions reached by the Supreme Court of the State of California, it is incumbent upon us to analyze the reasons as herein quoted for its reaching that decision, and to point out those facts therein stated and accepted to be true and which records, statistics and general common and judicial knowledge, in our opinion, bear us out to the contrary.

> In the Seventeenth Biennial Report of the Colorado State Penitentiary, the warden of that institution, speaking of the corrigibility and tractible disposition of life term prisoners, incidentally, and while discussing the use of convict labor for road making, in that report recently published says: ''With regard to the selection of convicts for road and ranch work I insist that this selection of convicts cannot be governed by the length of the sentence or nature of the crime. My experience has absolutely disproved the accepted theory that 'only short time men' can be trusted with this large measure of liberty. At present I am working eight 'life termers' away from the prison, their words of honor their only guard. In every camp, on every ranch, there are long sentence men, the type known as 'desperate criminals.' As a matter of fact, I find this kind—the strong characters of crime—much more susceptible to fair appeal than the jelly-back offenders. My real trouble is with the 'hoboes' who are always short term men.''

As to the destruction of the hopes of this type of prisoner; can it be said that a long term prisoner undergoing a sentence the duration of which will in all probability exceed the term of his natural life is not equally subject to the same temptations, the same emotions and to the same desire to escape from restraint as is the life termer? And as a consequence, will he not equally under like conditions be as reckless in his conduct and commit crimes as brutal as will the life term prisoner? Is not the law equally as impotent to mete out adequate punishment to long term prisoners as it is to life termers.

Upon reliable authority, we are informed that in the penal institutions of this State, the characteristic garb of the desperate criminal, known as the "red shirt", is not confined to "life termers", or to any prisoner undergoing any particular term of sentence, but is compelled to be worn by any convict incarcerated within a State prison of the State of California who has committed some crime while therein confined, or flagrantly violated some prison rule or otherwise evinced his viciousness.

While it is true that the good conduct laws prevailing in most of the United States are not applicable to a life term prisoner, yet he is alike with all other prisoners entitled to the benefit of the parole laws and to the benefit of pardon; and withal for what useful purpose are good conduct laws, so far

as the advantages to accrue from the shortening of a prisoner's term are concerned, to a prisoner undergoing a sentence of forty, fifty, or sixty years, which in all probability, even though he be given full credits for good conduct, will outlast the period of his natural life.

As a basis for upholding the validity of the statute in question, and for establishing its soundness and reasonableness, our learned State Supreme Court also says that the difficulty the Legislature would experience in fixing the term of imprisonment for convicts other than "life termers" who should commit the offense prescribed by Section 246 of the Penal Code, is sufficient to indicate that there is a natural and constitutional difference between the two classes of prisoners herein named. Counsel cannot conceive of any difficulty the Legislature would encounter in prescribing the *death penalty* under Section 246 for a long term prisoner committing the same offense or any particular prisoner undergoing sentence for the commission of specific offenses, as well as for a life term prisoner. A statute framed along such lines cannot possibly be subject to any attack affecting its constitutionality, and there is reason and justice, law and common sense in our contention that the only statute that will not be subject to attack on the ground of its unconstitutionality prescribing and

invoking the death penalty for the commission of the offense defined by Section 246 of the Penal Code is a statute that will not take into consideration in prescribing the penalty the *duration* of the prior term of the prisoner committing the crime, which term, as our statutes now exist, may be fixed for a period of years or for life at the caprice, whim, passion or prejudice of some trial judge.

There are many statutes contained in the Penal Code of the State of California where the punishment to be meted out to the defendant convicted of the crime charged may be either for a term of years or for life, such as rape, Penal Code, Section 264; robbery, Penal Code, Section 213, and other crimes.

Two prisoners charged with the commission of the same crime, tried by juries in different counties of the State of California, duly and regularly convicted, both sentenced to the same penitentiary even though they commit the offense inhibited by Section 246 of the Penal Code, may not suffer the same punishment therefor, because one of those defendants, owing to the frame of mind of the trial judge imposing the sentence and his particular personal prejudices and feelings in the matter, or against that particular crime, may be sentenced for a term of years. The other for the same reasons and circumstances though the commission of his offense may not be more heinous may be

sentenced for a term of life. These two prisoners, while undergoing their respective sentences in the State prison, may engage in combat and be equally guilty of an assault. The life term prisoner, under Section 246 of the Penal Code, would be subject to the death penalty. The long term prisoner would not be subject to punishment under that section.

A statute similar to the one here attacked, can be easily enacted by the Legislature and be more effective in its purposes, and no question arise as to its constitutionality, by prescribing that certain prisoners confined in the State prisons who had previously committed certain specific crimes naming them, or prescribing that prisoners who have been previously convicted of crime and are undergoing a second or third sentence, committing the offence inhibited by Section 246 of the Penal Code should suffer the death penalty. Such a statute would not be class legislation and would act upon all alike under like circumstances. As the statute now reads, it is cruel and inhuman, barbarous, unreasonable and unjust. It leaves wide open the avenue for escape of that great class of criminals usually the most vicious type, known as "habitual criminals" who are repeatedly serving successive sentences, and by reason of their experience in the commission of crimes and contact with the courts, have become so skilled in their pleas as to escape

the possibility of the imposition of a life sentence, all of which type, under Section 246 of the Penal Code, even though committing the crime therein inhibited, would not be subject to punishment thereunder.

All of the cases cited by the learned Attorney-General of the State of California, such as the cases of *Hayes* vs. *Missouri* and *Moore* vs. *Missouri*, cited in his brief and relied upon by him in his argument, are cases upholding the validity and constitutionality of the habitual criminal acts, which are a part of the penal laws of nearly all the States in the Union. We have no fault to find with those laws nor with the decisions upholding same. There can be no question as to their constitutionality. Sections 666 and 667 of the Penal Code of the State of California are such acts. It will be observed that all of the statutes without exception, in prescribing the increased punishment for the commission of the subsequent offence take into consideration either the nature of the crime of which the defendant was previously convicted or the amount of punishment prescribed for the commission of the crime subsequently committed and do not take into consideration the *duration of the sentence* imposed for the commission of the prior offence, which is the foundation for the in-

creased punishment provided for by Section 246 of the California Penal Code.

In the case of *State* vs. *Lewin,* 53 Kan. 667, 37 Pac. 168, a statute prescribing that a prisoner escaping from a State's prison upon conviction of that offence, could be punished by the imposition of a sentence equal to twice the term he was undergoing at the time of his escape, was declared unconstitutional by the Supreme Court of the State of Kansas for the reason that it was held to be class legislation and undue discrimination as to certain prisoners and because all prisoners committing the same offence were not punished equally or alike and also because the punishment was based upon the duration of the sentence the prisoner was undergoing at the time of his escape, instead of the punishment being based upon the nature of the specific offence committed or the nature of the prior crime under which the prisoner was serving his sentence at the time of his escape.

The Penal Code of the State of California prior to 1905 contained a statute greatly similar to the Kansas statute held by the Supreme Court of that State to be unconstitutional. The California Legislature, conceding that it had exceeded its constitutional powers amended in 1905 Section 105 of the Penal Code, prescribing the punishment for the escape of prisoners so as to remove the objection

that might have theretofore been raised against it with regard to its constitutionaliy.

California Penal Code, Deering's Edition 1909, *and Code Commissioner's Foot Note to Section* 105.

When this question was determined by the District Court of Appeal of the State of California, in and for the Third Appellate District, *in re Finley,* 1 Cal. App. 208, that Court maintained, among other reasons for supporting the constitutionality of Section 246, was the strong analogy that existed between said Section 246 and Sections 101, 105, Chapters 2 and 3 of the California Penal Code, relating to rescues and escapes. The decision of the Appellate Court was rendered on the 20th day of June, 1905, several months after those particular sections and the chapters referred to in that decision had been amended by the Legislature. There was therefore no existing analogy at the time of the rendition of that opinion, and the amendments in question made by the Legislature silently but powerfully acquiesce in our contention here made.

In conclusion, it may be said that counsel has been unable, after the most exhaustive research, to find among the Statutes of all of the States of the Union a law similar to the one here involved, and it is respectfully submitted in our opinion that it should not be allowed to stand as a valid Statute

in the State of California. There is no constitutional, intrinsic or reasonable distinction which justifies the segregation of a life term prisoner from other classes of prisoners for the purposes of invoking and applying the death sentence to them, when convicted of assault with a deadly weapon while confined within a state prison.

Respectfully submitted,

SAMUEL T. BUSH,

Of Counsel.

JAMES N. SHARP,
C. C. CALHOUN,

Attorneys for Plaintiff in Error.

23

No. 15

APR 27 1911

JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1910.

JAMES FINLEY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

BRIEF OF DEFENDANT IN ERROR.

U. S. WEBB, Attorney General
of the State of California,
Attorney for Defendant in Error.

Filed this..... day of April, 1911.

.....*Clerk.*

By.....*Deputy Clerk.*

Printed at the State Printing Office: W. W. Shannon, Superintendent.

IN THE

SUPREME COURT

OF THE

UNITED STATES

JAMES W. FINLEY,
Plaintiff in Error,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

Plaintiff in error was indicted by the grand jury of the County of Sacramento, State of California, for an assault with a deadly weapon with malice aforethought, as defined by Section 246 of the Penal Code of California, which reads as follows:

> "Every person undergoing a life sentence in a state prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death."

He was thereupon properly tried, and convicted of the offense charged in the indictment, and was thereafter sentenced to suffer the penalty of death.

Defendant thereupon took and perfected an appeal to the Supreme Court of the State of California, and after consideration by said court the judgment appealed from was affirmed.

Thereupon defendant applied for a writ of error to the Supreme Court of the United States, and said writ was granted.

Plaintiff in error assigns as error:

1. That the Supreme Court of the State of California erred in holding and deciding that section 246 of the Penal Code of the State of California does not contravene and violate section 1 of the Fourteenth Amendment of the Constitution of the United States.

2. That the said court erred in holding and deciding that said section 246 of said Penal Code does not make an arbitrary classification of persons standing in the same position relatively to the law.

3. That said Supreme Court erred in holding and deciding that said plaintiff in error is not denied the same protection of the laws, which is enjoyed by other persons or classes of persons in the same place and in like circumstances.

4. That said Supreme Court erred in holding and deciding that there is a reasonable distinction and classification between the case of a convict undergoing a life sentence, and a convict undergoing a sentence for a period of years, which in all human probability will exceed the term of natural life.

The appeal of defendant Finley was heard by the Supreme Court of the State of California and the judgment was affirmed. In the opinion of that court many reasons are set forth clearly showing that no

arbitrary discriminations or distinctions have been made in or by the Statute of California as to persons standing in the same relation to the subject of legislation dealt with by such statute.

People vs. *Finley*, 153 Cal. 61.

In the opinion the following language is used:

"The principal contentions of the appellant, advanced in different forms, resolve themselves into two propositions, both going to the constitutionality and validity of section 246 of the Penal Code. The first of these propositions is that it denies to the defendant the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Second, that it contravenes the provisions of section 11 of article I of the Constitution of this State declaring that all laws of a general nature shall have a uniform operation.

As to the genesis and origin of this comparatively new section of our Penal Code, it has long been a part of judicial knowledge, of legislative knowledge, and, indeed, of general knowledge, that convicts in penal institutions, undergoing sentences for life, constitute a most reckless and dangerous class. The conditions of their sentences destroy their hopes and with the destruction of hope all bonds of restraint are broken and there follows a recklessness leading to brutal crimes. These crimes became the more frequent as the impotency of the law to mete out adequate punishment for them was discerned. They were crimes of violence committed not alone against fellow inmates, but upon the custodians, officers, and guards of the institutions. The series of bloody and savage escapes and attempts to escape from the state prisons, which attempts were usually organized and headed by 'life-termers,' form a part of the history of our State. Indeed, it is known that at times the prison officials have deemed it wise to clothe the 'life-termers' in a characteristic garb, as a red shirt, that they might be the better watched throughout the day and the more readily picked out by the armed guards in cases of an emeute. Under this well-

recognized condition of affairs it seemed expedient to the legislature to meet the situation by the enactment of section 246 of the Penal Code.

It is upon the authority of the *City of Pasadena* vs. *Stimson*, 91 Cal. 252, and the numerous cases of like import, declaring that class legislation must be based upon some natural, intrinsic, constitutional, reasonable distinction, or otherwise that it is in violation of section 11 of article I of the Constitution of this State, that the appellant argues against the validity of the code provision. In this regard his contention is that there is no reasonable distinction to be drawn between the case of a convict undergoing a life sentence as such, and one undergoing a sentence for a period of years which in all human probability will exceed the term of natural life. But there are valid reasons which justify the distinction. The 'life-termers,' as has been said, while within the prison walls, constitute a class by themselves, a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual. As to a convict incarcerated for a term of years, his civic death ends with his imprisonment. The good conduct laws, whereby the term of imprisonment is shortened as to all other convicts, have no application to those undergoing a life sentence. Generally speaking, the crimes for which convicts suffer life sentences are graver in their nature and give evidence of more abandoned and malignant hearts than do the crimes of those undergoing sentence for years. And, finally, if the legislature sought to make the law applicable to convicts other than 'life-termers,' the difficulty which it would experience in fixing the term of imprisonment to which it should apply gives evidence itself that there is a reasonable rational class distinction between the 'life-termer' and the convict under sentence for years. It is concluded, therefore, that the classification in question is not arbitrary, but is based upon valid reasons and distinctions.

Nor can it be said that the act in question is violative of the Fourteenth Amendment of the Constitution of the United States. This amendment means simply that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons, or other classes, in

the same place and under like circumstances. (*Missouri* vs. *Lewis*, 101 U. S. 22.) Paraphrasing the language of the Supreme Court of the United States in *Moore* vs. *Missouri*, 159 U. S. 676 (16 Sup. Ct. 179), we can not perceive that appellant was denied the equal protection of the laws for every other person in like cases with him and convicted as he has been would be subjected to like punishment."

It is for the state court to determine whether or not its statutes are valid under the state constitution, and whether a person has received equal protection of the laws of the State in a regular administration of the criminal law.

Leeper vs. *Texas*, 139 U. S. 462;
O'Neil vs. *Vermont*, 144 U. S. 336.

In *Hayes* vs. *Missouri*, *post*, it is shown that the Constitution of the United States "merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed."

Hayes vs. *Missouri*, 120 U. S. 71.

The following language is used in the opinion of the court:

"The Fourteenth Amendment to the Constitution of the United States does not prohibit legislation which is limited either in the objects to which it is directed, or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed. As we said in *Barbier* vs. *Connolly*, speaking of the Fourteenth Amendment: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carry-

ing out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the amendment.' (113 U. S. 27, 32.)

In *Missouri* vs. *Lewis*, 101 U. S. 22, it was held, that the last clause of the amendment as to the equal protection of the laws, was not violated by any diversity in the jurisdiction of the several courts which the State might establish, as to subject-matter, amount, or finality of their decisions if all persons within the territorial limits of their respective jurisdictions have an equal right in like cases, and under like circumstances, to resort to them for redress; that the State has the right to make political subdivisions of its territory for municipal purposes, and to regulate their local government; and that, as respects the administration of justice, it may establish one system of courts for cities and another for rural districts. And we may add, that the systems of procedure in them may be different without violating any provision of the Fourteenth Amendment."

In the case of *Moore* vs. *Missouri, post,* consideration is had of the constitutionality of statutes providing for the punishment of habitual criminals. An examination of the statutes of many states of the Union, concerning the prosecution of second offenses committed by habitual criminals, shows that those statutes properly divide such criminals into different classes, with relation to the character or grade of the first perpetrated offense, and also with reference to the character and grade of the second perpetrated offense for which a defendant may then be upon trial.

Moore vs. *Missouri*, 159 U. S. 677.

The court reasons as follows:

"The reason for holding that the accused is not again punished for the first offense is given in *Ross's* case by Chief

Justice Parker, that 'the punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself'; in *Plumbly* vs. *Commonwealth*, by Chief Justice Shaw, that the statute 'imposes a higher punishment for the same offense upon one who proves, by a second or third conviction, that the former punishment has been inefficacious is doing the work of reform for which it was designed'; in *People* vs. *Stanley*, that 'the punishment for the second is increased, because by his persistence in the perpetration of crime, he has evinced a depravity which merits a greater punishment, and needs to be restrained by severer penalties than if it were his first offense'; and in *Kelly* vs. *People*, 'that it is just that an old offender should be punished more severely for a second offense—that repetition of the offense aggravates guilt.' It is quite impossible for us to conclude that the Supreme Court of Missouri erred in holding that plaintiff in error was not twice in jeopardy for the same offense or that the increase of his punishment by reason of the commission of the first offense was not cruel and unusual. *In re Kemmler*, 136 U. S. 436. Nor can we perceive that plaintiff in error was denied the equal protection of the laws, for every other person in like case with him, and convicted as he had been, would be subjected to the like punishment.

The Fourteenth Amendment means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' *Missouri* vs. *Lewis*, 101 U. S. 22. The general doctrine is that that amendment, in respect of the administration of criminal justice, requires that no different degree or higher punishment shall be imposed on one than is imposed on all for like offenses; but it was not designed to interfere with the power of the State to protect the lives, liberty, or property of its citizens, nor with the exercise of that power in the adjudication of the courts of the State in administering the process provided by the law of the State. *In re Converse*, 137 U. S. 624. And the State may undoubtedly provide that persons who have been before convicted of crime may suffer severer punishment for subsequent offenses than for a first offense against

the law, and that a different punishment for the same offense may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated. *Pace* vs. *Alabama*, 106 U. S. 583; *Leeper* vs. *Texas*, 139 U. S. 462."

In the case of *Pace* vs. *Alabama, post*, consideration was had of a statute of Alabama which, upon a superficial examination, would seem to make a class distinction based upon color of an individual. The decision of this Honorable Court shows, however, that when the precise nature of that statute is considered, the punishment of each person committing the offense charged is the same, irrespective of color, and that there is, as to persons affected by that statute, no arbitrary classification intended to operate merely as against a class of persons. So, also, the statute of California under consideration has not been intended to operate against any class of persons, considered merely as a class. No division of persons into a class by reference to color, nationality or other class distinction has been made. The statute of California bears against all persons similarly situated, who maliciously commit the offense described, and the classification is based upon inherent distinctions concerning such class.

The statute does not create the class for the purposes set forth therein, but treats the class as it finds it. The members of this class naturally fall into a group and separate themselves from other groups in society, because they possess like qualities, attributes and characteristics, which, of their own force, bring

them together. Thus, the law does not arbitrarily select certain persons and classify them for the purpose of this statute, but it deals with all persons alike, who, by reason of environment and characteristics, have grouped themselves together and have created a condition in society which must be coped with. Plaintiff in error contends that the law discriminates because it does not include in its treatment those who are serving long terms of imprisonment as well as life-termers; but those who are undergoing a sentence for a period of years which might exceed the term of natural life constitute another class, which do not have all the characteristics of the class dealt with in the statute. They do not have the same hope of parole. As to those sentenced for less than life, there is always a hope left that they may outlive their term. Although it may be proper to deal with long-termers, upon some such basis as has been adopted in the case of life-termers, this is a question for the legislature and not for the courts, and the fact that the legislature has not seen fit to so deal with long-termers does not constitute a discrimination against life-termers.

Pace vs. *Alabama*, 106 U. S. 585.

It is there stated:

> "The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offense for which the plaintiff in error was indicted when committed by a person of the African race and when committed by a white person. The two sections of the code cited are entirely consistent. The one prescribes, generally, a punishment for an offense committed between persons of different sexes; the

other prescribes a punishment for an offense which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Section 4184 equally includes the offense when the persons of the two sexes are both white and when they are both black. Section 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offense against which this latter section is aimed can not be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offense designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same."

The Constitution of California provides that no person shall be twice put in jeopardy; that cruel or unusual punishment shall not be inflicted, and that laws must operate uniformly upon all persons standing in the same relation to the law.

The decision of the Supreme Court of California holds that the statute under consideration does not contravene any of the provisions of the Constitution of California.

In the case of *In re Kemmler*, 136 U. S. 447, it appears that this honorable court will in some cases carefully examine and consider the reasons set forth in a decision, which have impelled the highest court of a state to its determination that a certain statute is not in contravention of the provisions of a state constitution, in instances where such provisions are comparable with provisions of substantially like character embraced in the Constitution of the United States.

In the case of *Kemmler*, the court says:

> "The decision of the state court sustaining the validity of the act under the state constitution is not reëxaminable here, nor was that decision against any title, right, privilege, or immunity specially set up or claimed by the petitioner under the Constitution of the United States.
>
> Treating it as involving an adjudication that the statute was not repugnant to the federal constitution, that conclusion was so plainly right that we should not be justified in allowing the writ upon the ground that error might have supervened therein."

In the case of

Moore vs. *Missouri*, 159 U. S. 677, *supra*,

it is stated:

> "It is quite impossible for us to conclude that the Supreme Court of Missouri erred in holding that plaintiff in error was not twice put in jeopardy for the same offense, or that the increase of his punishment by reason of the commission of the first offense was not cruel and unusual. *In re Kemmler*, 136 U. S. 436. Nor can we perceive that plaintiff in error was denied the equal protection of the laws, for every person in like case with him, and convicted as he has been, would be subjected to the like punishment."

In the case of

Armour Packing Company vs. *Lacy*, 200 U. S. 226,

it is held that this court will not interfere with the conclusion expressed by the highest court of a state, that under the provisions of the state constitution a tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed.

It is there stated:

> "As to the contention that the act is in violation of section 3 of article V of the state constitution, the state supreme

> court held that this tax, although not a property or ad valorem tax, was controlled, even if the requirement of uniformity were applicable, by the rule that 'a tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed.' And with that conclusion it is not our province, nor are we disposed, to interfere."

In the decision of the Supreme Court of the State of California hereinbefore referred to many reasons are set forth in support of that portion of the decision holding that the statute of California does not have the effect of denying to all persons similarly situated the equal protection of the law. In the light of the language stated in the *Kemmler* and other cases last cited it would appear that the decision of the Supreme Court of California, is, indeed, worthy of careful consideration.

It is not proper to apply the term "arbitrary classification" in referring to such persons as are mentioned in the Habitual Criminal Acts, in cases where the accused has suffered a previous conviction of a public offense.

> *Moore* vs. *Missouri*, 159 U. S. 676 (burglary and previous conviction of grand larceny).

It is there stated:

> "The punishment is for the last offense committed, and it is rendered more severe in consequence of the situation into which the party had previously brought himself."

In *Barbier* vs. *Connolly, post*, it was well said that the provisions of the Constitution of the United States were "not designed to interfere with the

power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order." Neither is the statute of California subject to the objection that it provides for the infliction of cruel or unusual punishment. The infliction of the death penalty does not per se constitute a cruel and unusual punishment. The question whether or not punishment of death by the use of the electric current was a cruel and unusual punishment is well considered in

In re Kemmler, supra.

"As due process of law in the Fifth Amendment referred to that law of the land which derives its authority from the legislative powers conferred on Congress by the Constitution of the United States, exercised within the limits therein prescribed, and interpreted according to the principles of the common law, so, in the Fourteenth Amendment, the same words refer to that law of the land in each state, which derives its authority from the inherent and reserved powers of the state, exerted within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions. Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty, or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses. But it was not designed to interfere with the power of the state to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order. *Barbier* vs. *Connolly*, 113 U. S. 27, 31.

The enactment of this statute was in itself within the legitimate sphere of the legislative power of the State and in the observance of those general rules prescribed by our system of jurisprudence; and the legislature of the State of

New York determined that it did not inflict cruel and unusual punishment and its courts have sustained that determination. We can not perceive that the State has thereby abridged the privileges or immunities of the petitioner, or deprived him of due process of law.

In order to reverse the judgment of the highest court of the State of New York, we should be compelled to hold that it had committed an error so gross as to amount in law to a denial by the State of due process of law to one accused of crime, or of some right secured to him by the Constitution of the United States. We have no hesitation in saying that this we can not do upon the record before us."

There is no question of cruel and unusual punishment in this case. The punishment of death is not cruel within the meaning of that word as used in the Constitution. As was said by this court in the above case, which we have so often quoted from:

"Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." (Page 447.)

Cruel and unusual punishment, as used in the Constitution of the United States and of this State, refers more to the manner and means of punishment than to the punishment itself, and, when used with reference to the death punishment, it means an adding to death itself of long torture or suffering, such as burning at the stake, crucifixion, breaking on the wheel, or the like. As was said in the case of

In re Storti (Mass.), 60 N. E. Rep. 210.

"Taking all the preliminaries most favorably for the prisoner, we are clearly of opinion that the Constitution

is not contravened by the act, and we render our opinion at once that we may avoid delaying the course of the law and raising false hopes in his mind. The answer to the whole argument which has been presented is that there is but a single punishment, death. It is not contended that if this is true the statute is invalid, but it is said that it is not true, and that you can not separate the means from the end in considering what the punishment is, any more when the means is a current of electricity than when it is a slow fire. We should have thought that the distinction was plain. In the latter case the means is adopted not solely for the purpose of accomplishing the end of death but for the purpose of causing other pain to the person concerned."

The provision in the Eighth Amendment of the United States Constitution contains no restriction on the powers of the State, but was intended to operate solely on the Federal Government.

Barron vs. *Baltimore*, 7 Peters, 243;
Pervear vs. *Commonwealth*, 5 Wall. 476

The first ten amendments to the Federal Constitution contain no restrictions on the power of the State, but were intended to operate solely on the Federal Government.

Brown vs. *New Jersey*, 175 U. S. 174;
Barron vs. *Baltimore*, *supra*:
Fox vs. *Ohio*, 5 How. 410;
Twitchell vs. *Commonwealth*, 7 Wall. 321;
United States vs. *Cruikshank*, 92 U. S. 542, 552;
Spies vs. *Illinois*, 123 U. S. 131;
In re Sawyer, 124 U. S. 200, 219;
Eilenbecker vs. *District Court of Plymouth Co.*, 134 U. S. 31;

Davis vs. *Texas,* 139 U. S. 651;
McElvaine vs. *Brush,* 142 U. S. 155;
Thorington vs. *Montgomery,* 147 U. S. 490;
Miller vs. *Texas,* 153 U. S. 535.

We must then look to our own Constitution for this inhibition upon cruel and unusual punishment. But our Supreme Court has held that this statute did not violate the provision of the State Constitution in reference to cruel and unusual punishment, and this court is bound by such decision. It was held in *Brown* vs. *New Jersey, supra,* "that the statutory provisions for a struck jury were not in conflict with the Constitution of New Jersey is for this court foreclosed by the decision of the higher court of the State."

Also, see

Louisiana vs. *Pillsbury,* 105 U. S. 278;
Hallinger vs. *Davis,* 146 U. S. 314, 319;
Forsyth vs. *Hammond,* 166 U. S. 506.

In

Smiley vs. *Kansas,* 196 U. S. 455,

it is said:

"It is well settled that in cases of this kind the interpretation placed by the highest court of the State upon its statutes is conclusive here. We accept the construction given to a state statute by that court. *St. L., I. M. & St. P. Ry. Co.* vs. *Paul,* 173 U. S. 404, 408; *M., K. & T. Ry. Co.* vs. *McCann,* 174 U. S. 580, 586; *Tullis* vs. *L. E. & W. R. R. Co.,* 175 U. S. 348. Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from what we recognize. It may be that the views of the Kansas court in respect to this matter are not in harmony with those expressed by us in *United States* vs. *Reese,* 92 U. S. 214; *Trade-Mark Cases,* 100 U. S. 82; *United States* vs.

Harris, 106 U. S. 629, and *Baldwin* vs. *Franks*, 120 U. S. 678. We shall not stop to consider that question nor the reconciliation of the supposed conflicting views suggested by the Chief Justice of the State. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined."

In

West vs. *Louisiana*, 194 U. S. 261,

this court said:

"Whether the state court erred in its construction of the state constitution and statutes and the common law on the subject of reading depositions of witnesses, is not a Federal question. We are bound by the construction which the state court gives to its own constitution and statutes and to the law which may obtain in the State, under circumstances such as those existing herein. Among many of the cases to that effect see *Brown* vs. *New Jersey*, 175 U. S. 172."

Armour Packing Co. vs. *Lacey, supra.*

Previous to the final decision of the case of defendant by the Supreme Court of the State of California consideration of the case, in and by proceeding of habeas corpus, was had by the District Court of Appeal of the State of California, in and for the Third Appellate District. In the decision of that case many reasons are clearly set forth why the act of the legislature of California does not present the case of a statute dealing with persons comprising a class arbitrarily selected. The decision of that case contains the following language:

In re Finley, 1 Cal. App. R. 202.

"It must be admitted that every person, *whether felon or freeman*, should be punished for making a deadly assault

on another. This, then, suggests an inquiry as to the punishment which could be inflicted on a guilty life convict, if the judgment of death be not permissible.

Through his own misconduct, such convict has forever forfeited his liberty and has suffered civil death. The only remaining right or privilege he can forfeit is his physical life. The limit of ordinary punishment has been reached; and if this only remaining penalty can not be inflicted, then such convict stands immune from further human retribution.

The necessity for such punishment can not be questioned. So sweet is liberty that men will do and dare anything to gain it. And when a man has forfeited that liberty, when the song of every bird and the breath of every zephyr tells the tantalizing story of privileges forever lost, desperation and despair make the victim, especially if naturally depraved, a dangerous and daring man. Under such circumstances he will be careless of other lives and all consequences. It is then absolutely necessary that those who come in contact with him should be carefully protected against his reckless and certainly against his *malicious* and *deliberate acts*. But it was urged in argument that such convicts can be punished by solitary confinement, a diet of bread and water, and other penalties now in use as part of prison discipline. The obvious answer to this is, that every convict, whatever his term, is subject to such penalties for *ordinary* infractions of prison rules. This is an incident attaching to the judgment already pronounced against him. But when a life convict commits an act amounting to far more than a mere infraction of disciplinary rules, an act denounced as a grave and dangerous crime in every criminal code, for us to declare that such penalties are the only ones that can be decreed as punishment for such act, would be to say with deliberate solemnity that the law not only tolerates but should *command* an idle act."

As was said in the *Kemmler* case, we can not perceive that the State has abridged the privileges or immunities of the petitioner or deprived him of due process of law. He has had his day in court under

this statute providing for additional punishment, and was tried according to all the forms of law. Our own Supreme Court has pointed out in regard to the statutes providing for additional punishment for hardened offenders that by these statutes the protection of all the forms of law are thrown around the defendant.

In the case of

People vs. *Coleman,* 145 Cal. 613,

our Supreme Court said:

> "In *People* vs. *Sickels,* 156 N. Y. 548, it is said in the opinion of the court: 'Reason suggests that the persistent and hardened offender needs a severer punishment. The previous punishment having failed to reform him, his guilt, upon his further offending, is greater, and, being so, severer treatment is needed to compel him to reform his ways, and in furtherance of the effort to prevent crime. In enacting that, upon a conviction for a second offense, the punishment shall be one of greater severity, the legislature has acted in accordance with the dictates of a wise policy and has invaded no constitutional right. How can it be said that the defendant has not had due process of law? The statute announced the enhanced penalty, which he would incur by repeating his infraction of the laws against crime. The indictment charged him with the aggravated crime, and he was put upon his trial, under the charge of being for a second time an offender, and, therefore, liable to suffer a severer punishment. His sentence was pronounced, after he had been tried and found guilty by the verdict of a jury. The course of the administration of justice was regular in all respects. When it is said that the presumption of the defendant's innocence was destroyed by the introduction of proof of his former conviction, the proposition is based upon mere assumption, and it is the error in that assumption which affects the appellant's argument. The statute has not abrogated the rule as to the presumption of innocence.'
>
> The scope and meaning of the fourteenth amendment to the constitution were considered *In re Kemmler,* 136 U. S.

436. The Supreme Court says in that case: 'The fourteenth amendment did not radically change the whole theory of the relations of the state and federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States.' (Citing a number of former decisions by the same court.) And again in *Leeper* vs. *Texas*, 139 U. S. 467, it is said: 'That by the fourteenth amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or classes of persons, of equal and impartial justice, under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice.' (Citing a number of cases.)

The defendant in this case, as appears from the record, was arraigned and tried in the same manner as any other defendant who has suffered a previous conviction is arraigned and tried, and therefore he was not discriminated against or deprived of due process of law, as shown by the decisions already cited and many others from the various states that might be cited to the same effect."

It is obvious that where one is undergoing imprisonment for life, and commits an assault of the character

mentioned in the statute, the punishment therein provided is the only one that can be effectually inflicted. A lesser degree of punishment would fall far short of satisfying the law and would, in reality, amount to no punishment at all. The statute applies equally to all persons embraced in the particular class mentioned therein. The classification is a necessary one, based upon inherent points of difference concerning the persons to be dealt with thereunder, and can not be termed arbitrary. It constitutes no mere placing of persons in classes in the same manner or degree that persons might be classed with reference to color, nationality, citizenship or by reference to similar qualities, and in no respect contravenes the provisions of the Constitution of California, or the Constitution of the United States.

In conclusion, it is to be observed that this writ of error is applied for under Section 709 of the Revised Statutes of the United States, which provides:

> "A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or any authority exercised under, any state, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under

such Constitution, treaty, statute, commission, or authority, may be reëxamined and reversed or affirmed in the Supreme Court upon a writ of error."

It has been recently held, following the case of *Western Union Telegraph Co.* vs. *Ann Arbor Railroad Co.*, 178 U. S. 239, that the court upon application for a writ of error is not precluded by a mere claim of a federal question from an examination to ascertain whether jurisdiction can be maintained or not. But the claim must be real and substantial. A mere claim in words is not enough.

Memphis vs. *Cumberland Tel. & Tel. Co.*, vol. 31, Sup. Ct. Rep., p. 115, January 15, 1911.

It does not appear on this record by a statement in a logical form that this case is one which really and substantially involves a dispute or controversy as to a right which depends on the construction of the Constitution or some law of the United States. Therefore, this writ must be dismissed for want of jurisdiction.

Respectfully submitted.

U. S. WEBB,
Attorney General of the State of California.
Attorney for Defendant in Error.

FINLEY *v.* PEOPLE OF THE STATE OF CALIFORNIA.

ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

No. 15. Argued October 26, 1911.—Decided November 6, 1911.

Whether a state statute denies equal protection of the laws by reason of classification depends upon whether there is a basis for the classification.

There is a proper basis for classification of punishment for crimes between convicts serving life terms in the state prison and convicts serving lesser terms.

Section 246 of the Penal Code of California inflicting the death penalty for assaults with intent to kill committed by life term convicts in the state prison is not unconstitutional under the equal protection clause of the Fourteenth Amendment because its provisions are not applicable to convicts serving lesser terms.

153 California, 59, affirmed.

THE facts, which involve the constitutionality under the equal protection clause of the Fourteenth Amendment of § 246 of the Penal Code of the State of California, are stated in the opinion.

Mr. C. C. Calhoun, Mr. James M. Sharp, Mr. H. G. W. Dinkelspiel, Mr. Samuel T. Bush and *Mr. G. C. Ringolsky* for plaintiff in error, submitted:

While the law with reference to classification within the constitutional meaning is well settled, the application thereof gives rise to question. *Yick Wo* v. *Hopkins*, 118 U. S. 356; *Barbier* v. *Connolly*, 113 U. S. 27; *Board of Education* v. *Alliance Assurance Co.*, 159 Fed. Rep. 994.

It is necessary to ascertain the reason and purpose of the statute to determine its validity. The rapid and be-

neficent advance of penal reform necessitates the conclusion that no trivial reason prompted or should be held to have prompted the statute. Boies, Science of Penology, 119.

The legislature did not base the statute upon the ground that life termers are more dangerous than other prisoners. *People* v. *Finley*, 153 California, 59, *contra*.

The term of imprisonment is determined by influences other than personal character. Drahms, The Criminal, 364; *Ex parte Mallon*, 16 Idaho, 737; 102 Pac. Rep. 374.

Life termers are not desperate because of the loss of all hope of freedom, since the parole law of California supplies ample relief.

Permanent loss of civil rights as compared with a temporary loss thereof does not make the life termer more dangerous than his fellow convict.

A law predicated on length of term is unconstitutional. *Ex parte Mallon*, 16 Idaho, 737; 102 Pac. Rep. 374; *State* v. *Lewin*, 53 Kansas, 679; 37 Pac. Rep. 168.

The only possible reason for the enactment of the statute is a seeming lack of adequate punishment for life termers.

The classification necessary to support a statute must be based upon real differences in the situation, condition and tendencies of things. *Ho Ah Kow* v. *Nunan*, 5 Sawyer, 552; *Gulf &c. Ry. Co.* v. *Ellis*, 165 U. S. 150; *Cotting* v. *Kansas City Stock Yards*, 183 U. S. 79; *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540; *Board of Education* v. *Alliance Assurance Co.*, 159 Fed. Rep. 994; *State* v. *Loomis*, 115 Missouri, 307; 22 S. W. Rep. 350; *State* v. *Miksicek*, 125 S. W. Rep. 506 (Missouri, 1910); *State* v. *Mitchell*, 97 Maine, 66, 73; *State* v. *Julow*, 129 Missouri, 163; 31 S. W. Rep. 781, 783; *State* v. *Thomas*, 138 Missouri, 95; 39 S. W. Rep. 481; *Murray* v. *Board of Commissioners*, 81 Minnesota, 359; 84 N. W. Rep. 103; *Nichols* v. *Walter*, 37 Minnesota, 264; 33 N. W. Rep. 800; *People* v. *Van*

De Carr, 86 N. Y. Supp. 644; *Jones* v. *C. R. Railway Co.*, 231 Illinois, 302, 308; *State* v. *Wright*, 53 Oregon, 344; 100 Pac. Rep. 296; *State* v. *Hammer*, 42 N. J. L. 435; *In re Van Horne*, 74 N. J. Eq. 600; 70 Atl. Rep. 986; *Gillespie* v. *People*, 197 Illinois, 501; 64 N. E. Rep. 533; *Phipps* v. *Wis. Cent. Ry. Co.*, 133 Wisconsin, 153; 143 N. W. Rep. 456; *Johnson* v. *City of Milwaukee*, 88 Wisconsin, 383; 60 N. W. Rep. 270; *Sutton* v. *State*, 96 Tennessee, 694; 36 S. W. Rep. 697; *State* v. *Goodwill*, 33 W. Va. 179.

The statute does not meet constitutional tests. There is no inherent difference between the life termer and the middle-aged long termer. See Report State Board Prison Directors, 1909–1910, 69 and 185; 70 and 184.

Owing to the condition of the California law, certain prisoners are, with reference to immunity from punishment, in the same position as life termers. Code Civ. Proc., § 669; Penal Code, § 245; *Ex parte Morton*, 132 California, 346; Penal Code, § 667.

The statute should be viewed from a broad position. It is unequal, special and discriminatory and unconstitutional.

Mr. E. B. Power, with whom *Mr. U. S. Webb*, Attorney General of the State of California, was on the brief, for defendant in error.

Memorandum opinion, by direction of the court, by Mr. Justice McKenna.

Section 246 of the Penal Code of the State of California provides as follows: "Every person undergoing a life sentence in a state prison of this State, who, with malice aforethought, commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable with death."

Plaintiff in error was indicted under this section, tried, found guilty and the death penalty imposed. To the judgment of the Supreme Court of the State affirming the sentence against him he prosecutes this writ of error and urges as ground thereof that § 246 is repugnant to the Fourteenth Amendment of the Constitution of the United States in that it denies to him the equal protection of the laws because it provides an exceptional punishment for life prisoners.

The Supreme Court sustained the law on the ground that there was a proper basis for classification between convicts serving life sentences in the state prison, as defendant was when he committed the crime for which he was indicted and found guilty, and convicts serving lesser terms.

It is elementary that the contention is to be tested by considering whether there is a basis for the classification made by the statute. Applying that test we see no error in the ruling. As said by Mr. Justice Henshaw, delivering the opinion of the court, "The classification [of the statute] in question is not arbitrary but is based upon valid reasons and distinctions." And pointing out the distinction between life prisoners and other convicts, he said that "The 'life termers,' as has been said, while within the prison walls, constitute a class by themselves, a class recognized as such by penologists the world over. Their situation is legally different. Their civic death is perpetual." Manifestly there could be no extension of the term of imprisonment as a punishment for crimes they might commit, and whatever other punishment should be imposed was for the legislature to determine. The power of classification which the law-making power possesses has been illustrated by many cases which need not be cited. They demonstrate that the legislature of California did not transcend its power in the enactment of § 246.

Judgment affirmed.

Before said union the property in controversy in this suit belonged to the Cumberland Presbyterian Church, the legal title being held by said Tennessee corporation for the use and benefit not of any local society or judicatory, but in trust for the entire denomination and was under the exclusive regulation and control through said board, of its general assembly. As a legal result of said union said property became the property of said reunited church and was held in trust by said corporation for the use and benefit of the entire re-united denomination and became subject to the exclusive regulation and control of its general assembly through said Board of Publication and Sabbath School Work. In order to more effectually exercise this power and duty of regulation and control said board appointed a committee of six of its own members, called the Nashville Committee. The members of the Cumberland Presbyterian Church who are citizens of other states than the State of Tennessee, who by virtue of said union became members of and are still members of said reunited church number, as complainants believe, about eighty-thousand. The membership of said reunited church, including said former Cumberland Presbyterians, number about one million three hundred thousand. It is therefore impracticable to make them all complainants of record. Their interest in the matter in *in* controversy in this suit is the same as that of complainants and complainants fairly represent all of said members in such controversy and hence complainants bring this bill in behalf of said other members, constituting the same class with themselves as well as in their own behalf.

Since the consummation of the union hereinafter referred to there has come into existence a voluntary religious organiza-
107 tion calling itself, unjustly, as complainants believe, the Cumberland Presbyterian Church. The General Assembly of that organization appointed the individuals named as defendants herein, its board of publication. A. C. Biddle, a citizen of the State of Kentucky, was also appointed a member of *d*aid board but being without the jurisdiction of this court he is not sued herein. The members of said new voluntary organization who reside within the State of Tennessee number several thousands supposed to be about twenty thousand. It is therefore impracticable to bring them or the other members of *of* said organization before the court. Their interest in the matter in controversy in this suit is the same as the interests of said individuals made defendants hereto and said defendants fairly represent all of said members and belong to the same class with them, and hence they are made defendants as representing not only their own interests but the interest of all the said members.

It is alleged in the original bill that under the charter of the Board of Publication of the Cumberland Presbyterian Church the true and lawful general assembly of the church has no power to remove its members. Complainants would now state in this connection that the charter had been so construed by that church for many years. Complainants are informed and believe that in no instance since the granting of said charter has the general assembly ever

assumed or exercised *the* such right of removal. Complainants are further advised and believe that membership in the church is not necessary to make one eligible to the position of a member of said board. Such has been the practical construction given the charter by the church for many years. The general assembly as complainants are informed and believe, has frequently elected to membership in said board persons who were not members of the church.

Complainants adopt the allegations and prayer of the original bill except as herein modified. In addition to the prayer of the original bill complainants pray that not only the individual defendants be enjoined as therein prayed but also that their successors, associates, agents, and those whom they are herein made to represent, be so enjoined and that said injunction be upon final hearing made permanent.

JOHN M. GAUT,
Solicitor for Complainants.

STATE OF TENNESSEE,
Davidson County, ss:

Before me, Charles F. Polak, a notary public in and for said county, this day personally appeared John M. Gaut, and made oath
108 that he is the solicitor of the complainants in the foregoing amendment to the bill in said cause and that the facts therein stated as of the knowledge of complainants are true and those stated upon information and belief of complainants he believes to be true.

JOHN M. GAUT.

Sworn to and subscribed before me this the 22nd day of April, 1909.

[SEAL.]

CHAS. F. POLAK,
Notary Public.

Endorsed: Filed 2:10 p. m., April 26, 1909. H. M. Doak, Clerk.

The following writ was issued, or subpœna to answer, viz:

The President of the United States of America to the Marshal of the Western District of Tennessee, Greeting:

You are hereby commanded to summon W. E. Dunnaway, a resident citizen of Madison County, State of Tennessee, to be and appear before the judges of the Circuit Court of the United States in the Sixth Circuit for the Middle District of Tennessee, at the Federal Court room at Nashville, in said State, on the first Monday of June next, then and there to answer the *the* bill of complaint of T. O. Helm, a resident citizen of Kentucky, Thomas H. Cobbs, a resident citizen of Missouri, and Thomas H. Perrin, a resident citizen of Illinois. Herein fail not and have then and there this writ.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States this the 16th day of April, in the year 1909, and of Independence the 133d year.

[SEAL.]

H. M. DOAK, *Clerk.*

Memorandum.

The defendant- *is* required to enter *his* appearance before the clerk of this court on or before the 7th day of June next and plead, answer or demur or the bill will be taken for confessed and set down for hearing ex parte.

H. M. DOAK, *Clerk.*

Returned.

Came to hand on April 20, 1909, and executed same by reading and making known the contents of this summons to W. E. Dunnaway on April 20, 1909, and also leaving a copy of said summons with the said W. E. Dunnaway at the same time and place.

FRANK S. ELGIN,
U. S. Marshal,
By G. W. STEWART, *D. M.*

Similar writs were issued for all the rest of the defendants and all duly and properly returned.

The following motion for a preliminary injunction was filed, to-wit:

T. O. HELM et al.
v.
W. E. DUNNAWAY et al.

109 In this cause complainants move the court for leave to amend the prayer of their bill by striking out from the 23d and 24th lines, on page 27 of the bill, the words, "claiming to be said board", and also by inserting after the word "court" in the 15th line of the same page the words "and be required to answer the same, but not on oath, the oath being waived".

Complainants further move the court for a preliminary injunction restraining defendants from taking possession of or attempting to take possession of any of the property of said corporation or interfering in any manner with the possession, control or management of said corporation by the persons now in possession and control of the same or with their administration of the corporation or of the trust.

Complainants further move the court for a preliminary injunction enjoining defendants or any of them from bringing any other suit in another court as to the right to manage said corporation or as to the possession of the property or the beneficiaries of the trust.

Complainants further move the court for a temporary restraining order restraining them pending the hearing and disposition of the motion for preliminary injunction from doing any of the things to be restrained by the preliminary injunction herein prayed for.

JOHN M. GAUT,
Solicitor for Complainants.

Endorsed: Filed April 16, 1909. H. M. Doak, Cl'k.

The followings writ of notice was issued, to-wit:

The President of the United States of America to the Marshal of the Western District of Tennessee, Greeting:

You are hereby commanded to make known unto W. E. Dunnaway, a resident citizen of Madison County, Tennessee, in the western district thereof, the following order made by Hon. E. T. Sanford, Judge, etc., at Nashville, Tennessee, in case No. 3590—T. O. Helm et al. v. J. H. Zarecor et al. viz:

"In this cause complainants came by attorney and filed a motion for a temporary injunction, restraining the defendants and those associated with them from attempting to take possession of the property described in the bill and from interfering in any manner with those now in possession of the same and from instituting any suit in relation to the possession of said property or the management of said corporation or the beneficiaries of the trust.

110 Complainants also moved for a temporary restraining order pending the hearing and disposition of the motion for a temporary injunction, restraining the defendants from doing any of the acts sought to be prevented by the temporary injunction.

Upon consideration the court orders and directs that the application for the temporary injunction be heard in court on Saturday, April 24, 1909, at ten o'clock a. m., when and where the defendants will appear and show cause, if any they have, why said pemporary injunction should not issue. A copy of this order will be served upon the defendants".

And have you then and there this writ with how you have executed the same.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 16th day of April, 1909, and of American independence the 133d year.

H. M. DOAK, *Clerk.*

Returned.

Came to hand on April 20, 1909, and executed on —— —— by reading and making known the contents of the within named on W. E. Dunnaway, on April 20, 1909, and also, leaving with him a copy thereof.

FRANK S. ELGIN,
U. S. Marshal.
By G. W. STEWART, *D. M.*

A like writ was issued for each of the other defendants and duly executed and returned.

An order was made as follows, viz: Said order is contained in the foregoing writ, except the following clause, viz:

Complainants also moved the court for leave to amend the prayer of their bill in the manner set forth in said motion, which leave is granted.

The following plea was filed, to-wit:

T. O. HELM et al.
v.
J. H. ZARECOR et al.

Now come the defendants, the Board of Publication of the Cumberland Presbyterian Church, J. H. Zarecor, F. A. Seagle, A. N. Eshman, R. L. Baskette, J. H. Fussell, J. H. Zwingle, W. N. Danley, S. A. Cunningham, and W. E. Dunnaway, who with A. C. Biddle, comprise the membership of the said Board and for plea to the jurisdiction of the court say, that the bill brought by the complainants does not present a proper controversy between citizens of different states (upon which ground alone jurisdiction is sought in this court), though the complainants have in their bill collusively made and omitted both complainants and defendants for the pur-
111 pose of showing a diversity of citizenship and creating a case cognizable in this court.

Complainants bring their bill for the alleged purpose of continuing and protecting certain persons, whose names they do not give, in the possession, control and management of the Publishing House and other property of the Board of Publication of the Cumberland Presbyterian Church located in Nashville, Tennessee; and they collusively omit the names of all such persons in order to make it appear that this court has jurisdiction of the alleged cause of action. Those persons are W. A. Provine, Hamilton Parks, W. T. Hardison, and John H. De Witt, citizens of Nashville, Tennessee, J. M. Johnson, a citizen of Illinois, J. H. Reynolds, a citizen of Georgia, L. M. Rice, a citizen of Kentucky, and M. G. Wood, a citizen of Missouri, in whom and in whom alone is the primary right of action, if any there be, for their own continuation and protection in the possession, control and management of the said property. They are alleged to compose the Board of Publication of the Cumberland Presbyterian Church and to be now and to have been for years in the rightful possession, control and management of the valuable property described in the bill and sought to be brought into litigation in this court. By the terms of the charter and of the deed the title to the property was vested in the Board of Publication of the Cumberland Presbyterian Church and the possession, control and management thereof was devolved upon the members of that Board for the use and benefit of the Cumberland Presbyterian Church and subject to the direction of its general assembly. The charter provides, among other things, "that William M. Reed, William E. Ward, and Andrew Allison, now constituting the committee of publication of the Cumberland Presbyterian Church, under the appointment of the general assembly, be and they are hereby constituted a body corporate and politic under the name and style of 'The Board of Publication of the Cumberland Presbyterian Church', and as such it shall have power to own property, to make contracts, to sue and to be sued, and to have and enjoy such other powers and be subject to such liabilities as are incident to corporate bodies by the general laws of the land; said Board shall be subject to the regulation and control of the general assembly of said church under its

past and future actions on the subject; the number of the Board may be increased or diminished and all vacancies filled as the said authority has or may direct; the general assembly of the
112 church shall also have power to locate the Board and change the same at pleasure; and also at any time to alter the name of said corporation or dissolve the same, but not so as to prejudice the rights of others." (Act 1850-60 sec. 34). The said persons, whose names and residences are not mentioned in the bill but have just *just* been set out in this plea, with Charles Manton, of C Texas, recently deceased, were some years ago appointed by the general assembly of the Cumberland Presbyterian Church as the sole members of the said Board and as such they were put in the possession, control and management of the property and business of the corporation for the use and benefit of the Cumberland Presbyterian Church, under the direction of the general assembly thereof and they have ever since that time had and now have the actual and physical possession, control and management of the said corporate property and business; but, as alleged in the bill and as the fact is, they have since May the 24th, 1906, acknowledged allegiance alone to the Presbyterian Church in the United States of America, and have held and now hold the said property and are now conducting the business of the corporation in the interest of the latter church. The general assembly of the Cumberland Presbyterian Church, at Dickson, Tennessee, in May, 1906, passed a resolution as follows: "Whereas the following named members of the Board of Publication of the Cumberland Presbyterian Church heretofore elected by the general assembly as members of said Board, to-wit, W. A. Provine, Hamilton Parks, Charles Manton, W. T. Hardison, J. M. Johnson, J. H. Reynolds, John H. De Witt, L. M. Rice and M. G. Wood, have denied allegiance to the Cumberland Presbyterian Church and have declared their allegiance to the Presbyterian Church in U. S. A., and are diverting the property, assets and belongings of said Board of Publication of the Cumberland Presbyterian Church from the use and benefit of the Cumberland Presbyterian Church and are now using the same in the interest of and for the benefit of the Presbyterian Church in U. S. A., whose doctrine, polity, and sentiments are materially and vitally different from the doctrine, polity and sentiments of the Cumberland Presbyterian Church, which is a palpable and flagrant violation of the trust reposed in them. (1.) Resolved therefore that this general assembly does hereby depose and remove the aforesaid members of said Board and declare their office as members of said Board vacant and they shall no longer be members of said Board and they are hereby prohibited
113 from exercising any of the powers or rights heretofore possessed by them by reason of their election or appointment as members of said Board of Publication of the Cumberland Presbyterian Church. (2) Be it further resolved, That J. H. Zarecor, F. A. Seagle, A. N. Eshman, R. L. Baskette, J. H. Fussell, Rev. A. C. Biddle, Rev. J. H. Zwingle, W. L. Danley, S. A. Cunningham, and W. E. Dunnaway be and they are hereby appointed, elected and constituted members of the Board of Publication of the Cumber-

land Presbyterian Church and as such shall have and possess all the powers, rights and privileges conferred by law upon the Board of Publication of the Cumberland Presbyterian Church by acts of the State of Tennessee, 1859-60, Chap. 167, secs. 34 and 35, and the amendments thereto and shall take and possess all property to which said Board is entitled."

Since the passage of that resolution the persons named in the second part thereof, being these personal defendants and A. C. Biddle, a citizen of Kentucky, have as they aver constituted the true and legal membership of the Board of Publication of the Cumberland Presbyterian Church and as such they have been legally entitled to the possession, control and management of the property and business of the corporation, all of which have been denied them by those previously in possesion, control and management and whose possession, control and management these complainants seek to continue and protect by their bill filed in this cause. These defendants aver therefore that all of those persons are manifestly indispensable parties to this suit and that they are omitted from the bill as parties for the collusive purpose of creating a case cognizable in this court; and that A. C. Biddle, one of the members of the Board, who was appointed by the general assembly of the Cumberland Presbyterian Church with these personal defendants in May, 1906, and who is a citizen of the State of Kentucky, as are T. O. Helm and George Gillum, is likewise an indispensible party, whose name is omitted from the bill for the same collusive purpose.

Complainants omit as parties complainant any members of the Presbyterian Church in the United States of America who are citizens of the State of Tennessee and at the same time omit to name or otherwise as party defendants any members of the Cumberland Presbyterian Church who are not citizens of the State of Tennessee, so doing improperly and collusively for the purpose of presenting a case of divers citizenship and inducing this court to assume
114 jurisdiction of the controversy. Complainants sue as members of the Presbyterian Church in the United States of America, residing, respectively, in the states of Alabama, Arkansas, Illinois, Kentucky, Missouri, Mississippi, New Jersey, Pennsylvania, and Texas, Collusively omitting to name as party complainant any one of the many hundreds of members of that church who are citizens of the State of Tennessee, and who bear the same relation to the controversy that complainants do; a few of the Tennessee members being G. W. Shelton, and W. D. Hardison, citizens of Davidson County, Tennessee, E. O. Gardner and H. C. Ward, citizens of Weakly County, Tennessee, B. S. Thomas and R. J. Parnell, citizens of Carroll County, Tennessee.

Complainants at the same time implead these defendants, all of whom are citizens of the State of Tennessee and members of the Cumberland Presbyterian Church, collusively omitting to join with them as defendants or otherwise any one of the one hundred thousand members of the Cumberland Presbyterian Church residing out of the State of Tennessee and who are citizens of the same states with the complainants and who bear the same relation to the alleged

cause of action as do all Cumberland Presbyterians in Tennessee except the members of the Board of Publication; a few of the members residing out of Tennessee being J. D. Lewis and Phillip Harris, of Alabama, J. S. Hall, of Arkansas, Arthur Quisenberry of Illinois, Elijah Hughes of Kentucky, W. K. Morrow, of Missouri, J. J. McClellan, of Mississippi, and William Clark, of Texas.

Following the attempt at union and merger alleged in the bill these personal defendants and, as they believe, about 125,000 other members of the Cumberland Presbyterian Church in the State of Tennessee and in other states already mentioned, refused to acquiesce in *in* the said scheme and to become members of the Presbyterian Church in the United States of America, or to willingly surrender to that church or to those fo-mer members going from them the houses of worship and other property conveyed for the use and benefit of the local congregations of the Cumberland Presbyterian Church; whereupon *v*certain of those persons, who did acquiesce in *in* the said scheme, for themselves as members of the Presbyterian Church in the United States of America and in the name of that church and for other members thereof brought an original injunction bill in the Chancery court of Fayetteville, Tennessee, against persisting Cumberland Presbyterians, to restrain them from in*B*erfering with the complainants in that bill and other members of the Presbyterian Church in the United States of America in their exclusive possession, use and control of the houses of worship *and*
Fayetteville, McKenzie and Kenton, Tennessee, which houses
115 stood upon lots of ground conveyed for the use and benefit
of the local congregations of the Cumberland Presbyterian Church at those places, respectively, to re-train them from doing other things not*t* necessary to mention here and to have the court adjudicate said scheme valid and binding on all members of the Cumberland Presbyterian Church. The style of that case was Ira Landrith et al. v. J. L. Hudgins et al., two of the complainants J. M. Hubbert and B. T. Fullerton being citizens of the State of Missouri and the other parties on both sides being citizens of the State of Tennessee. The complainants in that bill set up the scheme of union and merger in precisely the same language and in the same order that the said scheme is now set up in paragraphs II, III, IV, V and VI and in paragraph VIII to the end of the first sentence on page 27 of the bill filed in the present case. The prayer was in substance the same in that case as the prayer in this bill in part and to the extent that it sought to have the court adjudge that the said scheme of union and merger was legal and binding on the membership of the Cumberland Presbyterian Church and that it was effective to pass over the property of that church into the Presbyterian Church of the United States of America. The chancellor heard that case on bill, answer and proof and after due consideration dismissed the bill. The Supreme Court of Tennessee, on appeal of the complainants affirmed the decree of the chancellor for various reasons stated in a written opinion, delivered on the 3d day of April, 1909, a printed copy of which opinion is herewith filed as exhibit "A." In the decree of the Supreme Court entered in that cause it was ad-

judged among other things "that the proceedings taken for the union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America was unconstitutional and void and not ef-ective to unite or merge the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America. * * * That the Cumberland Presbyterian Church still remains a vital and independent organization with a general assembly, synods and presbyteries and that the defendants are truly identified therewith in doctrine, in polity and organic sub-ordination; that the complainants are not so identified but have united themselves with another and different ecclesiastical organization; that the property involved in this suit, to-wit * * * is vested in the defendant officers of the said Fayetteville church for the use and benefit of the congregation of Fayetteville which adhered to the Cumberland Presbyterian Church and that the complainants have no interest therein." A copy of that decree is herewith filed as exhibit "B." Copies of the bill and of one of the answers in that cause are herewith filed as exhibits "C" and "D," respect-
116 ively. The defendants now say that the complainants and those for whom they sue, as appears from their bill, have no interest in the property of the Board of Publication of the Cumberland Presbyterian Church unless and except by virtue of the said scheme of union and merger, which has by the court of last resort in Tennessee been adjudged unconstitutional, null and void; and yet the complainants bring their present bill for the obvious purpose of defeating the result of that decision and nullifying a rule of property established thereby, through the collusive making and omission of parties complainant and parties defendant in such manner as to present a controversy between citizens of different states and for the purpose of creating a case cognizable in this court, whose jurisdiction is by complainants invoked to re-open a controversy practically settled already by the Supreme Court of the State within whose borders the property involved is located. The defendants say that the complainants should not be allowed improperly and collusively to make and omit parties as hereinbefore indicated for the purpose of presenting a supposed and unreal controversy between citizens of different states and of creating thereby a case cognizable in this court; and the defendants pray the judgment of the court whether they shall be compelled to make any further defense or answer to the said bill and they pray to be *en* hence dismissed.

FRANK SL-MMONS,
W. B. LAWLER,
J. B. SIGER,
W. CALDWELL,
Attorneys for Defendants.

I certify that in opinion the foregoing plea is well founded in point of law.

——— ———.

STATE OF TENNESSEE,
Davidson County:

J. H. Zarecor makes oath and says that he is one of the defendants and that the foregoing plea is not interposed for delay and that the same is true in point of fact.

J. H. ZARECOR.

Sworn to and subscribed before me, this the 1st day of May, 1909.

H. M. DOAK, *Clerk.*

And for further plea to the jurisdiction of the court defendants say that in the month of December, 1907, the State of Tennessee by F. M. Bass, district attorney general for the tenth judicial district of Tennessee, filed in the Chancery Court of Davidson County, at Nashville, Tennessee, a bill in the nature of quo warranto proceeding on the relation of J. H. Zarecor and the other personal defendants in the present suit, citizens of Tennessee and of A. C. Biddle, a citizen of the State of Kentucky, against W. A. Provine, Hamil-
117 ton Parks, W. T. Hardison, and John H. De Witt, citizens of Tennessee, and Charles Manton (since deceased), a citizen of Texas, J. M. Johnson, a citizen of Illinois, John H. Reynolds, a citizen of Georgia, L. M. Rice, a citizen of Kentucky, and M. G. Wood, a citizen of Missouri, defendants, for the purpose of ousting the said defendants from membership in the Board of Publication of the Cumberland Presbyterian Church, and from the control, possession and management of the property and business of the said corporation, and for the purpose of installing the said relators in the room and stead of the said defendants as members of the Board of Publication of the Cumberland Presbyterian Church and in the possession, control and management of the pr-perty and business of the said corporation, that property and business being the same described in the bill in the present cause and sought to be brought into litigation in this court; the said defendants appeared and put in their answer to the said bill of the State after which numerous depositions were taken on both sides and duly filed as a part of the record in that cause, which now remains depending and *in*determined but soon to be tried before the chancellor; all of which these defendants now and here plead against the right of the present complainants to prosecute their bill in this court.

Copies of the said bill and answer are herewith filed as exhibits No. 1 and 2 respectively. The defendants in that bill had been appointed members of the Board of Publication of the Cumberland Presbyterian Church by its general assembly prior to the adoption on the 24th day of May 1906, of the alleged scheme of union and merger between the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, and the said defendants as members of said Board being at the time in the possession, control and management of all the corporate property went out of the Cumberland Presbyterian Church into the Presbyterian Church of the United States of America and have assumed to pos-

sess, control and manage the said property for the use and benefit of the latter church from that time until the present, when this bill is brought in this court to continue and protect them in that possession, control and management. The persons named as defendants in the bill of the State were by resolution of the general assembly of the Cumberland Presbyterian Church adopted in May, 1907, deposed and removed as members of the said Board and the relators in the State's bill were by the same resolution appointed members of the Board of Publication of the Cumberland Presbyterian Church in the room and stead of those who had been deposed and removed.

That resolution appears on pages 9, 10, and 11 of that bill,
118 exhibit No. 1. The said defendants nevertheless refused to surrender the possession, control and management of the corporate property and business to the relators whom the general assembly had appointed in their room and stead; and thus was made the controversy between the members formerly appointed and those latterly appointed by the general assembly, which controversy under the law of Tennessee could properly be presented for adjudication and settlement in court only by a bill in the name of the State in the nature of a quo warranto on the relation of those named as relators therein and who are the personal defendants in the present bill with the addition of A. C. Biddle. The defendants pray judgment whether they shall make any further answer or defense to the present bill and they pray to be hence dismissed.

FRANK SLEMMONS,
W. B. LAMB,
J. B. SIZER,
W. C. CALDWELL,
Attorneys for Defendants.

I certify that in my opinion the foregoing plea is well founded in point of law.

W. C. CALDWELL,
Attorney for Defendants.

STATE OF TENNESSEE,
Davidson County:

J. H. Zarecor makes oath and says that he is one of the defendants and that the foregoing plea is not interposed for delay and that the same is true in point of fact.

J. H. ZARECOR.

Sworn to and subscribed before me this the 1st day of May, 1909.

[SEAL.] H. M. DOAK, *Clerk.*

Endorsed: Filed May 1, 1909, H. M. Doak, Clerk.

The following motion for a receiver was filed, to wit:

HELM et al.
v.
ZARECOR et al.

The complainants move the court to appoint a receiver herein and to commit into his hands, pendente lite, the property described in the bill of complaint with directions to conduct, control and manage the same and the business connected therewith under the orders of the court until it shall be determined for whose use and benefit said property is to be held, managed and controlled.

Endorsed: Filed May 17, 1909, H. M. Doak, Clerk.

119 The following stipulation was filed, directing the clerk to omit from the record the opinion of the Supreme Court of Tennessee in the case of Landrith v. Hudgins et al., exhibit "A" to the foregoing plea, to-wit:

T. O. HELM et al.
v.
J. H. ZARECOR et al.

In this cause it is agreed that the clerk of the court may omit *the* from the record now being prepared for the Supreme Court of the United States the opinion of the Supreme Court of the State of Tennessee in the case of Landrith et al. v. Hudgings et al.

JOHN M. GAUT,
Solicitor for Appellants;
FRANK SLEMMONS,
Solicitor for Appellees.

Endorsed: Filed July 11, 1910, H. M. Doak, Clerk.

120 The following quo warranto proceeding was made an exhibit to the foregoing plee to the jurisdiction, to-wit: Exhibit No. 1 thereto:

To the Honorable John Allison, Chancellor, etc., holding the Chancery court at Nashville.

EXHIBIT 1 TO PLEA.

THE STATE OF TENNESSEE by JOHN M. BASS, District Attorney, for the 10th Judicial District of Tennessee on Relation of J. H. Zarecor, a Citizen of Davidson County; F. A. Seagle, a Citizen of Hamilton County; A. N. Eshamn, a Citizen of Davidson County; R. L. Baskette, a Citizen of Davidson County; J. H. Fussell, a Citizen of Maury County; A. C. Biddle, a Citizen of Kentucky; J. H. Zwingle, a Citizen of Davidson County; W. L. Danley, a Citizen of Davidson County; A. A. Cunningham, a Citizen of Davidson County; W. E. Daunnaway, a Citizen of Madison County, Relators,

v.

W. A. PROVINE, a Citizen of Davidson County; CHARLES MANTON, a Citizen of Texas; Hamilton Parks, a Citizen of Davidson County; W. T. Hardison, a Citizen of Davidson County; J. M. Johnson, a Citizen of Illinois; John H. Reynolds, a Citizen of Georgia; John H. DeWitt, a Citizen of Davidson County, L. M. Rice, a Citizen of Kentucky; M. G. Wood, a Citizen of Missouri, Defendants.

This bill is filed as a proceeding in the nature of a quo warranto for the purpose of ousting the defendants from the offices of members of the Board of Publication of the Cumberland Presbyterian Church and installing relators in their room and stead.

Complainant who brings this bill upon the information of the above named relators respectfully shows your Honor th-t the residences of said relators and of the defendants are as indicated in the above caption.

Complainant would respectfully show your honor that the Cumberland Presbyterian Church was organized February 4th, 1910, as a religious denomination in Dickson County, Tennessee. Its origin and growth will be more particularly set out hereafter. Suffice it to say that the organization grew out of a serious and irreconcilable difference in doctrine and policy which arose between certain members of the Presbyterian Church which at that time had and now had as its standard of faith the Westminster Confession of Faith. After the Cumberland Presbyterian Church had been in existence a number of years and had goown with great rapidity, in order to give wider scope to its usefulness and to more thoroughly disseminate its di-tinctive doctrine, its General Assembly, in 1829, appointed a committee of publication, which was directed as its first duty to publish 5000 copies of the Cumberland Presbyterian Confession of Faith and a year later appointed an editor for a newspaper that was to be its church organ.

121 In 1847 the general assembly merged its committee of publication into a board of publication and prescribed for it certain rules, among others the following:

1. That its members should be appointed by the general assembly and subject to its control.

2. That its members should be removed at pleasure and that any vacancy occurring might be filled by the board only until the meeting of the next general assembly.

3. That the board should report its condition and proceedings to each assembly.

4. That the profits of the board should be applied exclusively to the use of the general assembly and be used to enlarge the operations of the board, or otherwise promote the good of the whole church as the general assembly might direct.

5. That the funds be raised by voluntary subscription.

6. That all publications of the board should be authorized by an examining committee or the general assembly.

In 1849, under the sanction of the general assembly a number of agents solicited funds from the church at large for the benefit of this board of publication.

In 1858 the general assembly laid down certain rules which should govern the board of publication with reference to the terms upon which books and publications sould be sold, where the books should be deposited, what collection should be taken for publication and such like matters.

The board of publication continued its work without a break and was under the entire control of the general assembly and the members of said board were elected, their time fixed and from time to time other members were elected to fill the places of those whose terms had expired, and, in a number of instances, the members of the board have been removed and replaced by the general assembly.

In 1848 a board of publication, under the direction of the general assembly, was incorporated in Kentucky and had its head quarters at Louisville; but this board does not seem to have been very prosperous and in 1860 it was ordered that this charter be surrendered. Under the direction of the general assembly the Kentucky corporation surrendered all the property in its hands to the board of publication of the Cumberland presbyterian church, organized under a charter issued by the State of Tennessee, hereinafter to be noticed.

From the time of its origin the publishing interests of the
122 Cumberland Presbyterian Church have been under the direction of a number of its members, appointed and controlled by its general assembly and said members have been called sometimes a committee, sometimes a board and sometimes an association. At first they were not incorporated, but since 1860, these members have operated under a charter of the state of Tennessee as a corporation. But under whatever form or name the body existed, it was always under the complete control of the general assembly as to its policy, property and membership.

Under the direction of the general assembly the congregations of the church were required at a fixed date annually, for the benefit of said board, to take collections. From time to time various age-ts were appointed by said board upon the direction or by the sanction of the general assembly to solicit funds from the members of the

church for the benefit of said board. In short, said board from its origin has received from the church its property, officers, members, directions, and control. Whatever property said board now has was received from the church at large and has been held in trust for the use and benefit of the Cumberland Presbyterian Church. Said board was created and the funds contributed to be used for the dissemination and promulgation of the distinctive doctrines of the Cumberland Presbyterian Church and those doctrines were out of harmony with and antagonistic to the doctrines taught in the Westminster Confession of Faith which were and are the doctrines believed in and promulgated by the Presbyterian Church of the U. S. A.

Complainant charges and says that the funds contributed to said board were received in trust and in pursuance of the trust have been used since its origin to widen the influence, increase the membership, and educate the members of the church in the peculiar and distinctive doctrines of the Cumberland Presbyterian Church and complainant is advised that the property and belongings of said board are impressed with the trust of being so used and that to use them for any other purpose is a breach of trust. Said board has at all times until recently held itself out as the servant and agent of all the Cumberland Presbyterian Church and has regularly as such servant and agent received money and property from the congregations and individuals of said church. While the legal title to the property has been in said board as a corporation it has held it and used it as trustees of the Cumberland Presbyterian Church and there was no pretence until recently to the contrary.

Complainant would respectfully show your honor that the legislature of Tennessee by chapter 167, sections 34 and 35, acts
123 of 1859-60, incorporated the board of publication of the Cumberland Presbyterian Church. Said sections appear in the Act incorporating a number of like institutions, and are as follows:

SEC. 34. Be it further enacted, That William M. Reed, William E. Ward, and Andrew Allison, now constituting the committee of publication of the Cumberland Presbyterian Church, under the appointment of the general assembly, be, and they are hereby, constituted a body corporate and politic under the name and style of "The Board of Publication of the Cumberland Presbyterian Church," and as such it shall have power to own property, to make contracts, to sue and be sued, and to have and enjoy such other powers and be subject to such liabilities as are incident to corporate bodies by the general laws of the land; said board shall be subject to the regulation and control of the general assembly of said church under its past and future action on the subject; the number of the board may be increased or diminished and all vacancies filled as the said authority has or may direct; the general assembly of the church shall also have power to locate the board and change the same at pleasure; and also at any time alter the name of said corporation or dissolve the same, but not so as to prejudice the rights of others.

SEC. 35. Be it enacted, That no donation by will or otherwise or any conveyance to said board shall fail because of any mistake as to

the name of the corporation, provided the intention is manifest; and all donations clearly intended for the cause of publication in the said church shall inure to the said board, although they may be made to any other society or organization of the said church whether incorporated or not.

Reference is hereby had to said Act.

Under said Act said corporation was organized in the year 1860 and has existed ever since.

For about half a century the head office and place of business of said corporation has been in Nashville, Davidson County, Tennessee, and it has until recently been in charge of the publishing interests of the Cumberland Presbyterian Church, editing and printing the church organ, "The Cumberland Presbyterian"; printing, selling and distributing religious books and Sunday School literature, maintaining a bookstore doing general printing and job work. Said corporation has owned and now owns a lot or parcel of land situated in Davidson County, Tennessee, and described as follows:

Situated on the east side of North Cherry Street in the city of Nashville, Davidson County, Tennessee, being a part of lot
124 55 in the original plan of Nashville; fronting 99 feet on the east side of said Cherry Street and running back between parallel lines about 173-1/3 feet to an alley, being 99 feet off of the north side of said lot 55. (See deed recorded in Book 142, page 546, R. O. D. C.)

It has recently sold off of the north side of said 99 feet the following: A lot fronting 33 feet on east side of Cherry Street and running back between parallel lines to the alley above named east of and in the rear of said lot.

The plant and business offices and store of the said corporation are very extensive and of great value, to-wit: The printing office is thoroughly equipped with engines, printing presses, type, and other fixtures and machinery requiring a large number of employees. The building on the lot is commodious four-story house with many offices, elevators, steam heat and such like conveniences. An extensive bookstore is also run in connection with the same.

It will be seen from an inspection of the charter herein quoted that the general assembly of the Cumberland Presbyterian Church is authorized and empowered to elect the directors or members of said board and to change the same at pleasure.

In the exercise of that authority and power it has been the custom of the general assembly of the Cumberland Presbyterian Church since the granting of the charter to elect from time to time the members or directors of said board and of late years a certain proportion of them have been elected annually to serve for a certain number of years.

Complainant would further show your honor that the object of said board from the beginning until recently has been to serve the Cumberland Presbyterian Church and it has always until recently been under its direction and control; has until recently carried out its policies and advocated its doctrines—in fact it was one of the

arms of the Church. It was created and organized for that church as a separate and independent religious organization.

Complainant would now show your honor that the defendants named herein are wrongfully and unlawfully claiming to be the lawful and regular directors and members of said board and are assuming to exercise the powers conferred on said board and are holding its property. At a regular meeting of the general assembly of the Cumberland Presbyterian Church, held in Dickson County, Tennessee, in May, 1907, said defendants were removed as directors and members of said board and relators were elected by said assembly in their room and stead.

125 The resolution of said assembly of May, 1907, under which the defendants were removed and relators were elected as members and directors of said board is as follows:

Whereas the following named members of the Board of Publication of the Cumberland Presbyterian Church heretofore elected by the general assembly as members of said board, to-wit: W. A. Provine, Hamilton Parks, Chas. Manton, W. T. Hardison, J. M. Johnson, J. H. Reynolds, John H. De Witt, L. M. Rice and M. G. Wood have denied allegiance to the Cumberland Presbyterian Church and have declared their allegiance to the Presbyterian Church in the United States of America and are diverting the property, assets and belongings of said board of publication of the Cumberland Presbyterian Church from the use and benefit of the Cumberland Presbyterian Church and are now using the same in the interest of the Presbyterian Church in the United States of America, whose doctrine, polity and sentiments are materially and vitally different from the doctrine, polity and sentiments of the Cumberland Presbyterian Church, which is a palpable and flagrant violation of the trust reposed in them.

1. Resolved therefore, That this general assembly does hereby depose and remove the aforesaid members of said board and declare their office as members of said board vacant and they shall no longer be members of said board and they are hereby prohibited from exercising any of the powers or rights heretofore possessed by them by reason of their election or appointment as members of said Board of Publication of the Cumberland Presbyterian Church.

2. Be it further resolved, That J. H. Zarecor, F. M. Seagle, A. N. Eshman, R. L. Baskette, J. H. Fussell, Rev. A. C. Biddle, Rev. J. H. Zwingle, W. L. Danley, S. A. Cunningham and W. E. Dunnaway, be and they are hereby elected, appointed and constituted members of the Board of Publication of the Cumberland Presbyterian Church and as such shall have and possess all the powers, rights and privileges conferred by law upon the Board of Publication of the Cumberland Presbyterian Church by Acts of the State of Tennessee, 1859-60, Chap. 167, Secs. 34 and 35 and the amendments thereto and shall take and possess all property to which said board is entitled.

Said Board of Publication of the Cumberland Presbyterian Church are hereby authorized, empowered and directed to depose and remove from said board all such members of said board as have denied allegiance to the Cumberland Presbyterian Church and who are endeavoring to divert and devote the use of the property entrusted to

said board from the Cumberland Presbyterian Church and are
126 endeavoring to transfer said property to the use and benefit of the Presbyterian Church in the United States of America, and to this end the said Board of Publication of the Cumberland Presbyterian Church is hereby authorized, empowered and directed to bring and defend all suits to acquire and possess all property, assets, and belongings of said board as in the judgment of said board may be necessary.

And this board is fully authorized and empowered to do all other things necessary to the end that all property, assets and belongings may be restored to the use of the Cumberland Presbyterian Church, to which the same rightfully belong.

Pursuant to said resolution relators, on the 4th day of October, 1907, addressed a communication to each of the defendants, inclosing a copy of said resolution and demanding of them a surrender of the property in their possession. Although the communication was received by all the defendants, only one has answered and he has declined to vacate his office. The others ignored the communication.

As stated in said resolution the above-named defendants have denied allegiance to the Cumberland Presbyterian Church individually and as a board and are diverting the use of said property from the Cumberland Presbyterian Church and devoting the same to the interest and for the benefit of the Presbyterian Church in the United States of America.

Complainant further charges that said board by and through the said defendants is now submitting itself to the direction of the Presbyterian Church U. S. A. and under its direction said board by and through the said defendants has abandoned the publication of the Sunday School literature, except to a negligible extent. The policy of said board inaugurated and pursued by said defendants is now to cease to publish the literature that is of a distinctly Cumberland Presbyterian complexion and to cripple and destroy the work of the Cumberland Presbyterian Church.

In order that the court may more readily understand the matters of controversy between these relators and these defendants a brief historical sketch of the Cumberland Presbyterian Church at large, also the origin, progress and result of a movement looking to the absorption of the Cumberland Presbyterian Church at large with its ministry, membership and property, general and local, by the Presbyterian Church in the United States of America, are here given:

The Cumberland Presbyterian Church was organized in Dickson County, Tennessee, February 4, A. D. 1810. It was the outgrowth of the great revival of 1800—one of the most powerful revivals this country has ever witnessed. The founders of the church
127 were Finis Ewing, Samuel King, and Samuel McAdow. They were ministers of the Presbyterian Church who rejected the doctrine of election and reprobation as taught in the Westminster Confession of Faith.

The Cumberland Presbytery, which was constituted at the time of the organization of the church and which originally consisted of

only three ministers, was in three years sufficiently large to form three presbyteries. These presbyteries, in October, A. D., 1813, met at the Beech Church in Summer County, Tennessee, and constituted a synod. This synod at once formulated and published a "Brief Statement", setting forth the points where Cumberland Presbyterians dissented from the Westminster Confess- of Faith. They were as follows:

1. That there are no eternal reprobates;
2. That Christ died not for part only, but for all mankind;
3. That all infants dying in infancy are saved through Christ and the sanctification of the spirit;
4. That the Spirit of God operates on the world, or as co-extensively as Christ has made atonement, in such manner as to leave all men inexcuseable.

At this meeting of the synod, too, a committee was appointed to prepare a confession of faith. The next year, A. D. 1814, at Sugg's Creek Church, Wilson County, Tennessee, the report of the committee was presented to the synod and the revision of the West-m-nster Confession of Faith which they prepared was unanimously ado7ted as the Confession of Faith of the Cumberland Presbyterian Church. Subsequently the formation of the general assembly took place. This judicature at its first meeting A. D. 1829, at Princeton, Kentucky, made such changes in the form of government as were demanded by the formation of this new court.

In compiling the confession of faith the fathers of the Cumberland Presbyterian Church had one leading thought before them and that was to so modify the Westminster confession of faith as to eliminate therefrom the doctrine of universal foreordination and its legitimate sequences, unconditional election and reprobation, limited atonement, and divine influence correspondingly circumscribed. All the boldly defined statements of the doctrine were expunged and corrected statements were made. But it was impossible to eliminate all the features of hyper-Calvinism from the Westminster Confession—Faith by simply expunging words, phrases, sentences or even sections and then attempting to fill the vacancies thus made by corrected statements or other declarations, for the objectionable doctrine with its logical sequences pervaded the whole system of theology
128 formulated in that book.

The compilers knew this and they also knew that a book thus made must necessarily have some defects. Still they felt assured that they had prepared one which could not be fairly and logically interpreted without contradicting the most objectionable features of hyper-Calvinism; and they felt, too, that they had formulated a system of doctrines which any candid inquirer after truth might understand. They did not, however, claim that the time would never come when there might be a demand for a re-statement of these doctrines which would set forth more clearly and logically the system of theology believed and taught by the Cumberland Presbyterian Church. That time did come and so general was the desire throughout the church to have the confession of faith revised that at the general assembly which convened in the city

of Austin, Texas, A. D. 1881, a paper was introduced looking to that end and it was adopted by a unanimous vote.

In view of the great importance of the work two committees were appointed and it was made the duty of the first committee to revise the confession of faith and government and of the second to review and revise the work of the first. The committees met at Lebanon, Tennessee, the seat of Cumberland University, where every facility could be enjoyed for such labors, having free access to a fine theological library. After bestowing great labor upon their work, giving every item earnest and prayerful att-ion, the committee completed the tasks assigned to them and the results of their labors were published in pamphlet form and in weekly papers of the church for information, "that criticism might be made by those desiring to do so". The committees, after receiving these criticisms, again met and remained in session for a number of days, giving careful and prayerful consideration to all the suggestions made. They then completed their work without a single dissent and submitted the result to the general assembly which convened in the city of Huntsville, Alabama, A. D. 1882. That general Assembly, in "committee of the whole," considered with great patience and care every item of the entire book, taking a vote on each one separately and at the close of each chapter or subject taking the vote on it as a whole. In this way the entire book from beginning to end was carefully and prayerfully scrutinized and necessary changes were made—the most of them verbal—and there was not in the final vote a single negative.

Having completed its work the general assembly transmitted the book to the presbyteries for their approval or disapproval. The reports from the presbyteries to the next general assembly,
129 which convened in the city of Nashville, Tennessee, A. D. 1883, showed that this work had been almost unanimously adopted. The general assembly, having reviewed these returns from the presbyteries, formally declared said book to be the Confession of Faith and Government of the Cumberland Presbyterian Church.

The accuracy of the foregoing sketch is attested by the general assembly itself, which in the year 1885, ordered its insertion as a preface to the "Confession of Faith and Government," adopted in 1883. That was the last Confession of Faith and Government adopted by the Cumberland Presbyterian Church and, as complainant insists, is now in full force and effect and binding upon the entire church and all of its parts. This book was prepared, considered and adopted with too much care, — solemnity to be lightly considered and indifferently cast away only twenty-three years later. It is herewith filed as exhibit "A" to this bill and as such made a part hereof for all necessary purposes, but not to be copied unless called for by the defendants.

The Cumberland Presbyterian Church is only three years less than a century old. It has always been and as complainant is informed and believes and alleges, controlled and governed by its confession of faith and government, as indicated in the sketch herein

before quoted. Though uninco-porated itself, some of the boards and institutions of the Cumberland Presbyterian Church are chartered under the laws of Tennessee, Kentucky and other states.

From the time of its humble beginning in the year 1810, as aforesaid to the meeting of its general assembly in the month of May, 1906, the Cumberland Presbyterian Church extended its influence and organization into numerous states; and at the latter date as shown by the minutes of the general assembly at that meeting, the church had then seventeen synods, one hundred and fourteen presbyteries, fifteen hundred and fourteen ordained ministers, ninety-six hundred and fourteen ordained elders, thirty-nine hundred and fourteen ordained deacons, twenty-eight hundred an sixty-nine congregations and a total membership of one hundred and eighty-five thousand two hundred and twelve.

Since that time unfortunately the peace and harmony of this church has been interrupted and its membership somewhat diminished; nevertheless it is still an active organization of Christians with a prosperous and useful future before it, as complainant verily believes and alleges.

The general assembly at Nashville, Tennessee, in 1903, appointed a committee on presbyterian fraternity and union to confer with like committees of other presbyterian bodies in regard to the
130 desirability and practicability of closer affiliation and organic union among the members of the presbyterian family in the United States. This committee was appointed over the protesting overtures of a large number of presbyteries and commissioners who stoutly objected to the appointment of such a committee and who insisted that the whole matter be dropped, because the body of the church members were against such union or merger and it could have no other effect than to destroy the peace and unity of the church and that the whole movement was ill *da*vised and untimely. Many of these overtures were, for reasons satisfactory to the parties engineering the union movement suppressed and were neither read to the assembly nor printed in the minutes.

This committee reported to the general assembly at Dallas, Texas, in 1904, that it had agreed with a like committee of the Presbyterian Church in the United States of America that each of the two committees should submit to its own general assembly their joint report, favoring the reunion and union of these two churches in one under the name of the Presbyterian Church in the United States of America upon the doctrinal basis of its confession of faith, as revised in 1903, and of its other doctrinal and ecclesiastical standards and upon certain conditions and recommendations contained in the said report. The general assembly at Dallas adopted that report through the passage of a resolution by a close vote and referred a part of the "basis of union" to the presbyteries of the Cumberland Presbyterian Church for their approval or disapproval, this re-rence being conditioned upon the fact that the Moderator and stated clerk should thereafter be notified that the general assembly of the Presbyterian Church in the United States of America had likewise adopted the same report. This vote was taken late at night,

when many of the members who had opposed the report had left the assembly, it being the understanding that no vote should be taken at night; and when said vote was about to be taken there was confusion and misunderstanding as to the effect of the same. When the presiding moderator was requested to rule upon the scope of the resolution, he stated that the effect was merely to submit the question to the presbyteries without recommendation. Under this ruling eight members who would otherwise have been opposed to the resolution voted in its favor. They would otherwise have voted against the resolution thereby causing its defeat and the rejection of the said report.

Contrary to the ruling and statement of the moderator it is now claimed by the defendants and others favoring the joint report that the said resolution was a recommendation of the basis of
131 union by the general assembly.

When the questions submitted came to be voted on in the presbyteries several Cumberland Presbyterian ministers, who favored the so-called union and merger, resorted to double voting with a view of enhancing their cause; they voted for the scheme one time *and* their respective presbyteries and then went into other presbyteries meeting a little later and there voted for it again.

The next general assembly of the Cumberland Presbyterian Church, in session at Fresno, California, in 1905, appointed a special co-ittee to consider and report the result of the action taken by the presbyteries of that church. This committeee divided and presented a majority and a minority report.

The majority report was adopted by a close vote and the moderator declared that a majority of the presbyteries had approved the *por*position submitted to them. That report cited that only 111 presbyteries had expressed themselves, sixty of them voting approval, and fifty-one voting disapproval. With this report was exhibited a tabulated statement *whoing* there were in the 111 presbyteries 137 more presbyterial votes disapproving than approving. That is to say, the majority of the presbyteries voted approval, but of all the votes in these presbyteries a majority of 137 were against approval.

Many of the presbyteries voting approval were the smallest presbyteries, numerically, of the church, and many of those voting disapproval were the largest and the membership disapproving though not called on to vote was about three times as great as the part approving.

The minority report of the same committee, which was voted upon and rejected by a vote of 135 to 111 before the adoption of the majority report by a vote of 135 to 110, conceded that sixty of the presbyteries voted approval, but denied the reunion and union had been constitutionally agreed to and that the basis of union had been constitutionally adopted as stated in a resolution at the conclusion of the majority report and denied that the constitution of the church authorized such reunion and union and made numerous objections to the consummation thereof. The said reports and exhibit and the action of the general assembly thereon appear on pages 37 to 56 inclusive of the minutes of 1905.

Subsequently at the same meeting the committee on fraternity and union was increased by the addition of other members and was further directed to ascertain and report at the next meeting of the general assembly such other steps as might be deemed neces-
132 sary to be taken for the completion of the proposed reunion and union.

The report of this enlarged committee was adopted by a majority vote at the general assembly in session at Decatur, Illinois, in May, 1906; and, over the protests of a large minority, the moderator declared the basis of reunion and union to be in full force and effect. After the passage of a resolution to that end by the same majority, over the vote and protest of the same minority, the moderator declared the general assembly adjourned sine die as a separate assembly, to meet in and as a part of the 119th general asesmbly of the presbyterian church in the United States of America, on the third Thursday in May, 1907, at a place not named. The protest of the minority was made and filed before the roll call on adjournment and before the declaration thereof was made by the moderator. The said report and protest and the action of the general assembly thereon appear on pages 64 to 80 inclusive of the minutes of the said general assembly of 1906.

The said protest being disregarded from the start and the purpose of the minority to adjourn without day and without naming the place for another meeting being persisted in, the majority were informed on the floor of the assembly before the adjournment actually took place that the minority would treat the adjournment as illegal and ineffectual and would continue the session of the general assembly thereafter; and immediately upon the announcement of the adjournment, as aforesaid, and before the majority had actually dispersed, J. H. Fussell, a regular commissioner to the general assembly and one of the minority announced in a loud voice in the hearing of the majority and minority commissioners then in the assembly hall that the business of the general assembly would be resumed at once in the hall of the Grand Army of the Republic near by, the church building in which the previous parts of the session was held being refused for that purpose. The minority commissioners, being about 106 in number, then repaired immediately to the hall indicated and there elected Rev. J. L. Hudgins moderator and Rev. T. H. Padgett stated clerk, and other officers to fill the places of those who had gone away. Having done this the attempted adjournment a short time before and the previous declaration that the reunion and union were in full force and effect were treated as ineffectual and rescinded because deemed unauthorized and illegal; and then after the unfinished business had been transacted the general assembly adjourned in due form to meet again on the third Thursday in May, 1907, in Dickson County, Tennessee. And the general assembly of the Cumberland Presbyterian Church met ac-
cordingly in May, 1907, and transacted its regular business
133 in the accustomed way through a period of five days, then adjourned to meet again on the third Thursday in May, 1908, at Corsicana, Texas.

Complainant is informed and believes and alleges that since the aforesaid action at Decatur the former Cumberland Presbyterians who approved the action of the majority, including the defendants to this bill, have assumed and asserted that the aforesaid steps on the part of the general assembly and the presbyteries of the Cumberland Presbyterian Church and similar steps in the main on the part of the general assembly and presbyteries of the Presbyterian Church in the United States of America have effectuated a reunion and union between the two churches and completely merged the Cumberland Presbyterian Church with its ministry and membership and property into the Presbyterian Church of the United States of America.

Complainant believes and charges that the alleged union was brought about by fraudulent political methods which were intended to override the will of the large majority of the members of the Cumberland Presbyterian Church. As an instance of the methods that were resorted to by those favoring union, complainant shows that a secret circular was sent out and widely distributed by the secretary of a steering committee known as the "Voluntary Committee on Union Information," to persons favoring union in all or a large number of presbyteries, directing that the vote on union, then pending, be taken at the next meeting of the presbytery if it could be carried; if not, that the vote be postponed until the next presbytery. Two paragraphs of said circular will illustrate the methods resorted to. They are as follows:

3. If your presbytery, even after a full discussion, seems likely to be doubtful, or "anti-union," postponement should be urged, as that would be wiser than final adverse action. Six months of patient education on union will bring around enough votes to carry the presbytery into the union column next spring, though, if adverse action is taken now reconsideration next spring may be impossible. Vote if you can win; postpone rather than run the risk being defeated.

4. Our committee is ready with literature and, if necessary, with visiting debaters to render any legitimate assistance in the presbyteries where the issue is uncertain; and I shall be glad to hear from you if we can be of any assistance to you.

The double voting on the part of ministers, already referred to, was a part of the same plan.

134 Pursuant to the general policy of unionist leaders and the Presbyterian Church of the United States, of America, after the alleged union was claimed to have been consummated, another secret circular was sent out to many of the unionists in the bounds of the Cumberland Presbyterian Church branding those who refused to be bound by this union as agitators and offering to pay the expense bills of those engaged in accomplishing the destruction of the Cumberland Presbyterian Church. The following is an excerpt from one of these circulars sent out by J. M. Patterson, secretary of one of the boards of the church:

Another matter of great importance. Find out quickly where the anti-union agitators are at work and camp on their trail. Stay right with them. Leave none of their misrepresentatives (sic, Clk) un-

answered for twenty-four hours. Expose their methods in the city and town papers wherever you can get in. Drive them from the bounds of your presbytery as quickly as possible. If you need help from the pastoral oversight committee, this board or any of our synodical men, call on us at once, indicating where and when the men can help most and we will see that aid is given. Remember that in case this work should take you away from a few of your Sunday appointments, we are willing to pay for a supply, if necessary; and further, that all your necessary expenses incurred in travelling and corresponding will be paid by this board. Send in the bills promptly.

Complainant denies in toto the said assumption and assertion of union on the part of those favoring the said union and merger. Complainant is advised and believes and charges that there was no constitutional power in the general assembly and presbyteries of the Cumberland Presbyterian Church to form and accomplish such a union and merger and that every step taken to the end as aforesaid by the general assembly and presbyteries of that church was in violation of its constitution, ultra vires and void.

The Presbyterian Church in the United States of America could not and did not accept the assumed union as anything but a merger, were advised by their legal counsel that it could do nothing else without jeopard-ing its property and the so-called union was, in fact, but at attempted absorption of the Cumberland Presbyterian Church.

The constitution was and is the supreme law of the church. It is found in the printed book heretofore filed as exhibit "A" to this bill. The courts of the church are named in regular gradation and their powers defined by the constitution.

"These courts are denominated church sessions, presbyteries, synods and general assemblies". (Sec. 24); "and the juris-
135 diction of these courts is limited by the expressed provisions of the constitution". (Sec. 25). The powers of a presbytery are enumerated in section 31 of the constitution, and those of the general assembly, which is the highest court of the church, are enumerated in section 43.

The powers of the general assembly are greater and more comprehensive than those of the presbyteries and other courts of the church, being as follows:

The general assembly shall have power to receive and decide all appeals, references, and complaints regularly brought before it from the inferior courts; to hear testimony against error in doctrine and immorality in practice, injuriously affecting the church; to decide all controversies respecting doctrine and discipline; to give its advice and instruction in conformity with the government of the church in all cases submitted to it; to review the records of the synod; to take care that the inferior courts observe the government of the church; to redress whatever they may have done contrary to order; to concert measures for promoting the prosperity and enlargement of the church; to create, divide, or dissolve synods; to institute and superintend the agencies necessary to such labors as fall

under the church; to appoint ministers to, such labors as fall under its jurisdiction; to suppress schismatical contentions and disputations, according to the rules provided therefor; to receive under its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrine and order of this church; to authorize synods and presbyteries to exercise similar power in receiving bodies suited to become constituents of those courts and lying within their geographical grounds respectively; to superintend the affairs of the whole church; to correspond with other churches; and, in general, to recommend measures for the promotion of charity, truth and holiness throughout all the churches under its care.

Complainant is advised, informed, believes and charges that this enumeration, full and elaborate as it is, does not include the power to form and accomplish a union and merger of this church with and into another church. It does not even authorize the general assembly to make or entertain a proposition on such a subject. Nor does section 31 confer any such power on a presbytery. The jurisdiction of the general assembly and of the presbyteries being limited by the constitution to the express provisions thereof and those provisions not conferring the power in question, it must follow inevitably that the union and merger attempted as aforesaid and all steps taken for the accomplishment thereof were without constitu-
136 tional authority and therefore as complainant is advised, believes and charges, illegal, ultra vires and void.

Self-destruction or self-surrender was foreign to the thoughts and language of the framers of the constitution. The possibility of such a catastrophe was not contemplated by them. No power to accomplish such a result was given and none can be inferred.

Complainant is advised and believes and charges furthermore that the express restriction of the powers of the general assembly and the presbyteries to certain specific subjects is equivalent to a positive prohibition against the usurpation of any other powers.

Moreover, complainant is advised and believes and charges that, if there had been the most ample constitutional power in the general assembly and presbyteries of the Cumberland Presbyterian Church to form a union with and effectuate a merger into another church conformed to its "doctrine and order" completely or even substantially, still the so-called union and merger asserted by the defendants and other unionists would be illegal, inoperative and void, because the Presbyterian Church in the United States of America is not of the same or substantially of the same faith and order as the Cumberland Presbyterian Church. The two associations were and are essentially different both in doctrine and polity and these differences alone, in and of themselves, as complainant is advised, and believes and charges, present insuperable barriers to the so-called union and merger.

The Presbyterian Church in the United States of America was and is Calvinistic in its doctrine, having for its creed the Westminster Confession of Faith, which is contained in a printed book filed as exhibit "B" to this bill and made a part hereof for all purposes, but not to be copied unless called for by the defendants; while on the

other hand, the Cumberland Presbyterian Church was and is in its doctrine in the middle ground between Calvinism and Arminianism, having for its creed the Confession of Faith adopted as before stated, in 1883. The doctrines of the two churches were and are, therefore, absolutely variant and irreconcilably antagonistic in certain essential and substantial features. The differences that led to the formation of the Cumberland Presbyterian Church still exist in the main, as will readily appear to the court from the following parallel quotations:

Presbyterian Church in the United States of America.

Confession of Faith. Of God's Eternal Decree. Chapter III.

III. By the decree of God, for the manifestation of his
137 glory, some men and angels are predestined unto everlasting life, and others foreordained to everlasting death.

IV. These angels and men, thus predestined and foreordained are particularly and unchangeably designed; and their number is so certain and definite that it cannot be either increased or diminished.

V. Those of mankind that are predestined unto life, God, before the foundation of the world was laid, according to His eternal and immutable purpose, and the secret counsel and good pleasure of His will, hath chosen in Christ, unto everlasting glory, out of his mere free grace and love, without any foresight of faith or good works, or perseverance in either of them, or any other thing in the creature, as conditions or causes moving Him thereunto; and all to the praise of His glorious grace.

VI. As God hath appointed the elect unto glory, so hath he by the eternal and most free purpose of his will fore-ordained all the means thereunto. Wherefore they who are elected, being fallen in Adam, are redeemed by Christ, are effectually called unto faith in Christ by his spirit working in due season; are justified, adopted, sanctified and kept by his power through faith unto salvation. Neither are any other redeemed by Christ, effectually called, adopted, justified, sanctified and saved, by the elect only.

VII. The rest of mankind, God was pleased, according to the unsearchable counsel of his own will, whereby he extendeth or withholdeth mercy as he pleaseth, for the glory of his sovereign power over his creatures, to pass by and ordain them to dishonor and wrath for their sin, to the praise of his glorious justice.

The Larger Chatechism.

Q. What are the decrees of God?

A. God's decrees are the wise, free and holy acts of the Council of his will, whereby from all eternity, he hath, for his own glory, unchangeably fore-ordained whatsoever comes to pass in time, especially concerning angels and men.

Q. 13. What hath God especially decreed concerning angels and men?

A. God, by an eternal and immutable decree, out of his mere love for the prayers of his glorious grace, to be manifested in due time, hath elected some angels to glory; and in Christ hath chosen some men to eternal life, and the means thereof; and also, according to his sovereign power, and the unsearchable counsel of his own will (whereby he extendeth or withholdeth favor as he pleaseth) hath passed by and fore-ordained the rest to dishonor and wrath, to be for their sin inflicted, to the praise of the glory of his justice.

138 The Shorter Catechism.

Q. What are the decrees of God?

A. The decrees of God are his eternal purpose according to his will, whereby for his own glory, he hath fore-ordained whatsoever comes to pass.

Chapter X. Of Effectual Calling.

I. All those whom God hath predestined unto life and those only, he is pleased in his appointed and accepted time, effectually to call by his word and spirit, out of that state of sin and death in which they are by nature, to grace and salvation by Jesus Christ; enlightening their minds spiritually and savingly, to understand the things of God; taking away their heart of stone and giving them a heart of flesh; renewing their wills and by his almighty power determining them to that which is good; and effectually drawing them to Jesus Christ, yet so as they come most freely, being made willing by his grace.

II. This effectual call is of God's free and special grace alone, not from anything at all foreseen in man, who is altogether passive therein, until, being quick-ed and renewed by the holy spirit, he is thereby enabled to answer this call and to embrace the grace offered and conveyed in it.

III. Elect infants, dying in infancy, are regenerated and saved by Christ through the spirit, who worketh when, and where, and how he pleaseth, so also are all elect persons, who are incapable of being outwardly called by the ministry of the word.

IV. Others, not elected, although they may be called by the ministry of the word and may have some common operations of the spirit, yet they never truly come to Christ, and therefore cannot be saved. * * *

The Larger Catechism.

Q. What is the effectual calling?

A. Effectual calling is the work of God's almighty power and grace, whereby (out of his free and especial love to his elect, and from nothing in them moving him thereunto) he doth in his accepted time invite and draw them to Jesus Christ, by his word and spirit, savingly enlightening their minds, renewing and powerfully determining their wills, so as they (although in themselves dead in sin) are hereby made willing and able freely to answer his call and to accept and embrace the grace offered and conveyed therein.

Q. 68. Are the elect only effectually called?

A. All the elect and they only are effectually called; although others may be and are often outwardly called by the min-
139 istry of the word, and have some common operations of the spirit; who for their wilful neglect and contempt of the grace offered them, being justly left in their unbelief, do never truly come to Jesus Christ.

The Shorter Catechism.

Q. 19. What is the misery of the estate whereinto man fell?

A. All mankind, by their fall, lost communion with God, are under his wrath and curse, and so made liable to all the mis-ries of this life, to death itself, and to the pains of hell forever.

Q. 20. Did God leave all mankind to perish in the estate of sin and misery?

A. God having out of his mere good pleasure, from all eter*m*ity, elected some to everlasting life, did enter into a covenant of grace, to deliver them out of the estate of sin and mis-ry, and to bring them into an estate of salvation by a redeemer.

Q. 21. Who is the redeemer of God's elect?

A. The only redeemer of God's elect is the Lord Jesus Christ, who, being the eternal son of God, became man, and so was and continueth to be God and man in two distinct natures and one person forever.

Chapter XI. Of Justification.

I. Those whom God effectually calleth, he also justifieth; * * *

IV. God did, from all eternity, decree to justify all the elect; and Christ did in the fullness of time die for their sins, and rise again for their justification; nevertheless, they are not justified, until the holy spirit doth in due time actually apply Christ unto them.

Chapter XIII. Of Sanctification.

I. They who are effectually called and regenerated, having a new heart and a new spirit created in them are further sanctified, really and personally, through*n* the virtue of Christ's death and resurrection, by his word and spirit dwelling in them; * * *

The Larger Catechism.

Q. What is sanctification?

A. Sanctification is a work of God's grace whereby they whom God hath before the foundation of the world chosen to be holy are in time, through the powerful operation of his spirit, applying the death and resurrection of Christ unto them, renewed in their whole man after the image of God; * * *.

Chapter XIV. Of Saving Grace.

I. The grace of f*a*ith whereby the elect are enabled to believe to

the saving of their souls is the work of the spirit of Christ
140 in their hearts; and is ordinarily wrought by the ministry of the word; by which also and by the administration of the sacraments and prayer it is increased and strengthened.

Chapter XVII. Of the Perseverance of the Saints.

Chapter XVII. Of the Perseverance of the Saints.

1. They whom God hath accepted in his beloeved, effectually called and sanctified by the spirit, can either totally nor finally fall away from the state of grace; but shall certainly persevere ther-in to the end and be eternally saved.

II. This perserverance of the saints depends not upon theor own free will, but upon the immutability of the decree of election, flowing from the free and unchangeable love of God the father; upon the efficacy of the merit and intercession of Jesus Christ; the abiding of the spirit of the seed of God within them; and the nature of the covenant of grace; from all w-ich ariseth also the certainty and infallibility thereof.

Cumberland Presbyterian Church.

Confession of Faith.

"Decrees of God".

8. God, for the manifestation of his glo*t*y and goodness, by the most wise and holy counsel of his own will, freely and unchangeably ordained or determined what he himself would do, what he would require his intelligent creatures to do and what should be the awards respectively of the obedient and the disobedient.

9. Though all divine decrees may not be revealed to men, yet it is certain that God has decreed nothing contrary to his re*leave*d will or written word.

Free Will.

34. God, in creating man in his own likeness, endued him with intelligence, sensibility, and will, which form the basis of moral character, and renders man capable of moral government.

35. The freedom of the will is a fact of human consciousness and is the sole ground of human accountability. Man in his estate of innocence was -oth free and able to keep the divine law, also to violate it. Without any constraint, from either physical or moral causes, he did violate it.

Catechism.

Q. 7. What are the decrees of God?

The decrees of God are his wise and holy purposes to do what shall be for his glory. Sin not being for his glory, therefore, he has not decreed it.

Divine Influence.

141 38. God the Father, having set (sent?) forth his son, Jesus Christ, as a propitiation for the sins of the world, does most graciously vouchsafe a manifestation of the holy spirit with the same intent to every man.

Regeneration.

51. Those who believe in the Lord Jesus Christ are regenerated, or born from above, renewed in spirit and made new creatures in Christ.

54. All infants dying in infancy, and all persons, who have never had the faculty of reason, are regenerated and saved.

Catechism.

21. What are the evils of that estate into which mankind fell?

Mankind, in consequence of the fall, have no communion with God, discern not spiritual things, prefer sin to holiness, suffer from the fear of death and remorse of conscience, and from the apprehension of future punishment.

22. Did God leave mankind to perish in this estate?

No; God, out of his great good pleasure and love did provide salvation for all mankind?

23. How did God provide salvation for mankind?

By giving his Son, who became man, and so was, and continues to be both God and man in one person, to be a propitiation for the sins of the world.

Justification.

48. All those who truly repent of their sins and in faith commit themselves to Christ, God freely justifies. * * *

Saving Faith.

45. Saving faith, including assent to the truth of God's holy word, is the act of receiving and resting upon Christ alone for salvation, and is accompanied by contrition for sin and a full purpose of heart to turn from it and live in God.

Preservation and Believers.

60. Those whom God hath justified, he will also glorify, consequently the trul- regenerated soul will not totally fall away from a state of grace, but will be preserved to everlasting life.

61. The preservation of believers depends on the unchangeable love and power of God, the merits, advocacy and intercession of Jesus Christ, the abiding of the holy spirit and seed of God within them, and the nature of the covenant of grace. * * *

142 Revision of 1903.

In the year 1903 the Presbyterian Church of the United States of America made a "Declaratory Statement" in reference to Chapter 3 and to section 3 of Chapter 10 of its Confession of Faith and added two new chapters to the book, thereby constituting what is called the "Revision of 1903."

It is not believed, however, that the said statement made any change or alteration in the original meaning of the objectionable parts of the Confession of Faith referred to therein, or that such statement and the added chapters rendered that book any less Calvinistic than it was in 1810, when the Cumberland Presbyterian Church was organized. Indeed that statement does not purport to be more than a mere explanation, which could have been made as well and as consistently in 1810 as in 1903, the English language in which the Westminster Confession of Faith was written being the same all the time. Besides it is logically impossible that it should have changed and altered the true meaning of the original book whose language remained unchanged and unaltered. Moreover only a few sections are referred to in that statement, while in fact the Calvinistic doctrine with its logical sequences, so objectionable to Cumberland Presbyterians and so carefully excluded by them from their Confession of Faith of 1883, "pervaded the whole system of theology formulated in that book"—the Westminster Confession of Faith. Nor was the Larger Catechism or the Shorter Catechism, though equally objectionable to Cumberland Presbyterians and equally antagonistic to their written Conession of Faith, referred to or in any manner changed or altered by the declaratory statement or the added chapters.

The original text of the Westminster Confession of Faith, as it existed in 1789 and in 1810, has been reproduced literally in the book of 1903 and the meaning thereof is in no degree affected or intended to be affected by either the declaratory statement or the chapters added in the same year.

The general assembly of the Presbyterian Church in the United States of America, in 1901, instructed its committee on revision, then appointed to prepare amendments to certain portions of its Confession of Faith, "either by modification of the text or by declaratory statement, but so far as possible by declaratory statement, so as more clearly to express the mind of the church, with additional statements concerning the love of God for all men, missions and the holy spirit. It being understood that the revision shall in
143 no way impair the integrity of the system of doctrine set forth in our Confession and taught in the holy scriptures." P. Min., 1901, 6. —.

In response to that instruction the committee reported and the church afterwards adopted the Declaratory Statement and the added chapters, being chapters XXXIV and XXV, already referred to.

That no part of this revisionary matter was expected to impair, or to be allowed to impair the existing system of doctrine of the church, is shown by the resolution of appointment just quoted; and

that no such effect was produced in the mind of that committee and of the church is shown by the preamble to the added chapters and also by a resolution passed by the general assembly in 1904, after the question of union and merger, now under consideration, was raised. That resolution was in the language following, to-wit:

"Resolved, 4. That the assembly in connection with this whole subject of union with the Cumberland Presbyterian Church, places on record its judgment that the revision of the Confession of Faith effected in 1903, has not impaired the integrity of the system of doctrine contained in the Confession and taught by the holy scriptures, but was designed to remove misapprehensions as to the proper interpretation thereof. P. Min. 1904, p. 119-129.

Complainant alleges and charges that as a part of their respective system- of doctrine the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church in their theological schools and through their theological books present each its respective ordo salutis or the order of salvation and growth in grace. The Presbyterian Church in the United States of America, consistent with its system of doctrine as set forth in its confession of faith, teaches the following order: (Tabulated in the exhibit, not followed here—Clerk):

Regeneration (or effectual calling), Justification, Adoption, Sanctification, Faith, Repentance, Good Works, Perseverance.

And this order is in no wise changed by the so-called revision of 1903.

While the Cumberland Presbyterian Church, consistent with its system of doctrine as presented in its Confession of Faith, teaches the following order:

Divine Influence (Conviction), Repentance, Faith, Regeneration, Adoption, Sanctification, Growth in Grace, Good Works.

Complainant charges that the respecrive systems of doctrine of which the foregoing orders of salvation are exponents are in
144 irreconcileable conflict and an effort to merge the two must result in the absolute destruction of one or the paralysis of both.

Complainant further charges that the policies of the two churches are not at all in harmony. On the very material and vital question of the education of the ministers or the educational qualifications for ordination to the ministry the two churches are wholly adverse and the difference involves a constitutional question. Under the constitution and rule of government of the Presbyterian Church in the United States of America the standard is fixed and the presbyteries are left with no discretion, but must require compliance with the requirements of the standard before ordination is allowed. Whereas in the Cumberland Presbyterian Church, while favoring the highest degree of education possible under given circumstances, the presbyteries are left with discretion in the matter of ordaining a man who is not up to the desired standard educational-, but otherwise fully qualified to preach. It is this difference in polity as complainants believe and allege which has enabled the Cumberland Pres-

byterian Church to carry the gospel to the poor in country districts and elsewhere not reached by the other churches.

Complainant further alleges and charges that the two churches are wholly adverse in the race question, especially in reference to the commingling of the white and black races in the presbyterian synods and general assembly.

Negroes are not admitted as members in any of these bodies of the Cumberland Presbyterian Church, but they are admitted in all of them by the Presbyterian Church in the United States of America—in its general assembly upon exact equality with its white members and in its presbyteries and synods with certain doubtful provisions for separation of the two races at the discretion of the general assembly. Those provisions in reference to the separation of the two races in presbyteries and synods were brought about by the first recommendation in the aforesaid joint report on union and reunion, as will appear from the minutes of the general assembly of the Presbyterian Church in the United States of America. In the report made by the committee of the general assembly of that church, submitting the said joint report, it is said: "No effort was made by the Cumberland Presbyterian Committee to secure any change as to the church relations of the colored ministers and congregations now in connection with this general assembly. It was understood that these relations were matters that belonged to our church alone.

"The committee in all negotiations stood firm upon the
145 scriptural principles of the real unity of the household of *d* faith and the equality of all its members. It was also clearly understood by both committees that these principles were to control the church in the future as well as in the past and that as a result if presbyteries were organized on race or national lines they would be represented equally with all other presbyteries in the general assembly. This equal representation of all presbyteries in the Supreme Court will emphasize and preserve the unity of the church, while allowing, so long as needful, in exceptional cases, separate congregations, presbyteries and synods. (See minutes, 1904, page 133).

At the same session of that general assembly and as one of the series of resolutions heretofore referred to, was passed the following:

Resolved, 5. That in approving the overture looking to a change in the form of government concerning the territorial bounds of presbyteries and synods, this assembly affirms its complete freedom from prejudice against any race and from any desire or purpose to bring about a separation from our church, or from representation in the General Assembly, or any class or race of Presbyterians; but, on the other hand, our purposes to bring together in one Church members of all races and classes." (Ib. 119.)

Complainant verily believes and alleges that the commingling of the two races upon terms of equality in these Church Courts, without reserve and imperatively in the General Assembly and partially and conditionally in the Presbyteries and Synods, would inevitably result in disaster to both races, and greatly impede the cause of religion in those sections of the country where the Cumberland

Presbyterian Church has heretofore maintained its organization and accomplished so much good.

Complainant earnestly repeats the charge that the difference between the doctrine and polity of the Presbyterian Church in the United States of America and those of the Cumberland Presbyterian Church are so great, so material and so essential as to completely inhibit a union between the two Churches, and to nullify absolutely all steps, taken for the accomplishment of that end as aforesaid.

Complainant is advised believes and charges that the Confession of Faith, and Constitution of the Cumberland Presbyterian Church are the same now as they were in 1883, as then embodied in the book heretofore exhibited to this bill, and that neither of them was in any measure changed or abrogated by any or all of the aforesaid steps taken in furtherance of the so-called union and merger.

146 It is of no avail to the defendants in this cause and other unionists that section 60 of that constitution authorizes amendments to that instrument and to the confession of faith, because no amendment to either was in fact made or even proposed. The proposition attempted to be submitted by the general assembly at Dallas in 1904, through the presbyteries, was not intended as an amendment to anything; and if it had been intended as an amendment to either or both of those documents, the attempt would have been abortive inevitably, for the reason that no defi*t*nite and specific change as to either was proposed in the general assembly and by it definitely and positively approved as an amendment. The joint report on the subject of union was adopted and the "Templeton Resolution" was passed, directing that the basis of union therein recited be recommended to the presbyteries of the Cumberland presbyterian church for their approval or disapproval, provided the moderator and stated clerk should thereafter receive "official notification of the adoption of said joint report on union by the general assembly of the presbyterian Church in the United States of America. (See pages 30, minutes Cumberland Presbyterian General Assembly, 1904).

A part of the "basis of union" was the thing submitted to the Presbyteries and the language of submission was: "Do you approve of the reunion of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church on the following basis: The union shall be effected on the doctrinal basis of the Confession of Faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards; and the Scriptures of the Old and New Testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice? (ib. 62*a*).

Complainant is advised and believes and charges that the question thus propounded to the presbyteries is without any essential element of an amendment; that to have been effective as an amendment it should have recited the exact and entire language of the change designed to be made in so many words, should have been unco-ditional and definite in all its terms, should have been proposed in the general assembly as an amendment and so approved by that body

and as such by it recommended to the presbyteries for their approval and should then have been approved by a majority of the presbyteries. The absence of any one of these things, as complainants are advised and believe and charge, was and is sufficient to prevent the said action from becoming effective as an amendment; and
147 all of them were wanting, as will readily appear to the court from what has been said herein and from an inspection of the record of that action above referred to as embodied in the minutes of 1904.

Complainant is advised and believes and charges that the aforesaid action of the general assembly at Fresno, California in 1905, and at Decatur, Illinois, in 1906, gave no sanctity or validity to the previous action of the general assembly and presbyteries as an amendment or change of the Constitution or Confession of Faith of the Cumberland Presbyterian Church and that what the general assembly did at each of those places and previously in reference to the so-called union and merger was absolutely null and void because in conflict with the organic law of the church. They are advised and believe and charge that the attempted adjournment without day and without naming the place for the next meeting by the majority at Decatur, Illinois, in 1906, as aforesaid, was in direct violation of section 41 of the constitution of the church; and that the minority who continued the session of the general assembly at that time and place, as aforesaid, after that abortive attempt, were the only legal representatives of the Cumberland Presbyterian Church in that body; that they constituted a quorum for the transaction of business under section 42 of the constitution and consequently that the action taken by them as hereinbefore recited was legal and effective to perpetuate the general assembly of the Cumberland Presbyterian Church.

Complainant is advised and believes and alleges that all or nearly all of the presbyteries and synods of the Cumberland Presbyterian Church have since the date last named held regular sessions and transacted their regular business in the name of and under the authority of the Cumberland Presbyterian Church.

The general assembly of the Cumberland Presbyterian Church, pursuant to adjournment met in Dickson County, Tennessee, in May, 1907, with its full quota of officers and representatives from many presbyteries. It transacted the regular business as provided in the constitution and remaining in session the usual length of time, it adjourned to meet in May, 1908, in Corsicana, Texas. It was recognized by other church courts then in session and friendly greetings were exchanged with them—except the reply of the general assembly of the Presbyterian Church in the United States of America, then in session at Columbus, Ohio, was contemptuous and evasive. A copy of the minutes of the general assembly of the Cumberland Presbyterian Church of May, 1907, is herewith filed, marked exhibit "C" and asked to be taken as a part hereof,
148 but need not be copied unless called for. The reply of the Columbus Assembly above referred to will be found upon the last pages of said minutes.

Complainant is informed and believes and alleges that so-called union and merger have met with great disfavor and disapproval among the communicants of each of the two churches concerned, although there has been and is probably more objection and complaint proportionately among Cumberland Presbyterians than among members of the other church. Naturally more complacency and acquiescence would be expected in the absorbing body, whose faith and polity remain unchanged, than in the body attempted to be absorbed with utter destruction and annihilation of its faith and polity.

Complainant is advised and believes and charges that two members of the committee on the part of the Presbyterian Church in the United States of America dissented from the joint report, that a respectable minority voted against this adoption and that many of its members and ministers were from the first and are now unalterably opposed to the so-called union and merger for various reasons, among them that such an arrangement is calculated to produce inevitable discord in both the churches, thereby hindering and retarding their usefulness and the general growth of Christianity.

Of the resident membership of the Cumberland Presbyterian Church at large as comprised at the meeting of the general assembly of 1906, at least 100,000 or more than two-thirds, as complainant is informed and believes and alleges, are unalterably opposed to the so-called union and merger and firmly fixed in their purpose to do all legally within their power to perpetuate the life and usefulness of that church, in whose history they have so much pride and whose doctrines alone they can conscientiously accept and promulgate. Indeed, by a recent showing of said Presbyterian Church in the United States of America, about 40,000 of the members went into said church.

Some of residue, which is less than one-fourth of the whole membership, are neutral on the subject, and many of those acquiescing in the so-called union and merger are doing so because misled by others into the belief that they are powerless to do otherwise and bound to submit even against their conscientious convictions to the domination of self-appointed, self-commended, and self-praised leaders.

The Presbyterian Church in the United States of America is large and rich in members, endowments, church houses, and publishing facilities. They have no need for the Cumberland Presbyterian Publishing-house property save to add to their already extensive holdings and its acquirement would merely result in the establishment without cost of a stronghold from which to fight the Cumberland Presbyterian Church. It has been used, since the agitation of the union question began, to forward the union and since the alleged union it has been its energies to the destruction of the Cumberland Presbyterian Church.

149

The Presbyterian Church in the *the* United States of America has adopted as its policy the utter destruction of the Cumberland Presbyterian Church. In a litigation commenced by it more than a year ago, it sought to restrain by injunction the members of the

Cumberland Presbyterian Church from printing and selling their Confession of Faith, using the name of "Cumberland Presbyterian", or interfering with the Presbyterian Church in the United States of America in exclusive occupation of the church houses of the Cumberland Presbyterian Church. Complainant refers to the case of Ira Landreth et al. vs. J. L. Hudgins et al., brought in the Chancery Court at Fayetteville, since dismissed by the chancellor and now pending in the Supreme Court at Nashville upon appeal of the therein complainants. Under said bill the therein complainants procured the arrest of ten members of the congregation of the Cumberland Presbyterian Church at Jackson under what they assumed was a violation of said injunction. They were discharged by the chancellor's decree, but that decree was appealed from, and, as complainant is advised, they are still under bond.

Complainant is advised and believes and alleges that a considerable number of presbyteries of the Presbyterian Church in the United States of America presented overtures to the general assembly of said church which met at Columbus, Ohio, in June, 1907, protesting against the above-named litigation and the attempt to deprive the Cumberland Presbyterian Church of its property, but the same were never read to the assembly or printed in the minutes or acted on by said assembly.

And so it is that said attempted union and merger being void and of no effect, complainant is advised that the attempt to adjourn the general assembly of the Cumberland Presbyterian Church since die and surrender its existence and name and turn over its property to the Presbyterian Church in the United States of America is also null and void and relators, having been regularly elected by the general assembly of the Cumberland Presbyterian Church, are entitled to be placed in their office.

The premises considered complainant prays:

1. That the parties named as defendants be made such by proper process and subpœna and that due publication be made for the non-residents;

150 2. That they be required to answer this bill, but their oath is waived under the statute;

3. That upon final hearing a decree be entered removing each and all of defendants from the offices as members of the Board of Publication of the Cumberland Presbyterian Church and installing relators in their room and stead.

Grant general relief.

W. C. CALDWELL,
CARTER, LAMB & LAMB,
FELIX W. MOORE,
NOLEN & SLEMMONS,
Solicitors for Relators.

F. M. BASS,
Attorney General, etc.

STATE OF TENNESSEE,
County of Davidson, ss:

In this cause affiants, J. H. Zarecor, and R. L. Baskette, relators in the foregoing bill, make oath in due form of law that the statements therein contained, made as of their own knowledge, are true, and those as made on information and belief they believe to be true.

J. H. ZARECOR.
R. L. BASKETTE.

Subscribed and sworn to before me, this the 5th day of December, 1907.

[SEAL.] JAMES GRAHAM,
Notary Public.

I am surety for the costs,

J. B. MITCHELL.

151 Unto the foregoing quo warranto proceeding the following answer was made and filed, to-wit:

EXHIBIT 2 TO PLEA.

Demurrer and Answer. Filed February 10, 1908.

STATE OF TENNESSEE:

Chancery Court of Davidson County.

STATE OF TENNESSEE ex rel. J. H. ZARECOR et al.
v.
W. A. PROVINE et al.

The defendants, W. A. Provine, Hamilton Parks, Charles Manton, W. T. Hardison, J. H. Johnson, John H. Reynolds, John H. De Witt, L. M. Rice, and M. G. Wood, demur to the bill filed is said cause and for grounds of demurrer say:

1. That the bill shows that defendants were duly elected members of the Board of Publication of the Cumberland Presbyterian Church and that the resolutions seeking to remove them were passed without power or authority or effCetiveness to do so, by the general assembly of another religious society than that which elected them.

2. That the bill shows that under the constitution of the Cumberland Presbyterian Church its general assembly had supreme executive, legislative and judicial powers; that said general assembly had the authority to determine whether or not the doctrines and form of government of the Presbyterian Church in the United States of America were in accord with those of the Cumberland Presbyterian Church and, if so, to unite with said church upon such terms and under such name as the judgment of the general assembly might dictate; that such a union was validly and regularly effected and

that said action was binding upon the defendants and the board of publication of the Cumberland Presbyterian Church.

3. That the bill and exhibits, when fairly interpreted, show that in the union of said religious denominations there has been no abandonment of the purposes for which the Cumberland Presbyterian Church was organized, no diversion of the property involved in this cause to uses other than those for which it was acquired and held and that no such abandonment or diversion has been, or is now, contemplated; and that the uses of said property by defendants is in accord with the purposes for which it was acquired.

4. The bill shows that the relators are claiming in a civil court a right of property which is dependent upon questions of doctrine, discipline, ecclesiastical law and church government and policy, which questions have been adversely decided to them by the
152 highest tribunal within the Cumberland Prebyterian Church and to which they have been regularly and properly carried; and this court, being a civil court, will accept that decision as conclusive a*b*d be governed by it in its application to the matters and questions involved in this cause; and therefore the right of the defendants to be members of the board of publication of the Cumberland Presbyterian Church cannot be questioned in this proceeding and for the causes mentioned in the bill.

5. That the bill shows that the said board of publication and its members were under its charter made subject to the regulation and control of the general assembly of the Cumberland Presbyterian Church; that they are bound by the acts of said general assembly; that *that* the rights, powers and authority of the general assembly over the board of publication have, by virtue of the union of the said religious denominations, become attached in the same manner to the general assembly of the *the* United *Charities* known as the Presbyterian Church in the United States of America; and that defendants must hold the property involved in this cause in trust for said reunited church or religious denomination.

6. That the bill shows that the relators and their associates belong to a church that has no power or authority, no right of regulation or control, over the said board or publication and its members and no interest whatsoever in the property held by said board; that said church, although it styles itself the same, is not the Cumberland Presbyterian Church that was organized in 1810, but was organized in 1906, out of the disruption and secession on their part from the regular organization of the Cumberland Presbyterian Church; and that it is not the church and its general assembly that have, under the charter of the board of publication, the right of regulation, control, etc., over the said board.

7. That the bill shows that the property held in trust by defendants as constituting said *n*oard of publication was acquired in the ordinary way of purchase or gift, for the use of a religious denomination and not devoted by any express terms to support any specifie relig-ous doctrine or belief; and this court will only seek to award the use of said property to those who constitute that denomination, or its legitimate successors, and will not inquire into the existing relig-

ious (sic—Cl'k.) of those who adhere to the regular organization. Nevertheless, the bill and exhibits show that there is no substantial difference between the doctrines of the Cumberland Presbyterian Church and those of the Presbyterian Church in the United States of America.

8. That the averments of the bill as to fraudulent political
153 methods alleged to have been used in bringing about the aforesaid union of the churches are vague, general and entirely insufficient as any basis upon which to declare the aforesaid union to be invalid; that the bill shows that the action taken by the general assembly at Dallas, Texas, in 1906, was valid and regular; that it was the duty of all members thereof to be present at all its sessions and the bill fails to aver that any members were induced to remain away by any false misrepresentation; that the resolution adopted submitting the question of union to the presbyteries was plain and clear to any one and the relators cannot be heard to say that any of the members were too ignorant to comprehend it; and that the statement of the moderator could not and did not materially affect the result. The bill shows that the circulars sent out by the unionists were merely part of a legitimate campaign, involving no fraud whatever; and the bill fails to show that the alleged double voting by ministers in the presbyteries materially affected the result.

9. The bill shows that the attitude or policy of either religious —toward negroes is a question which said denominations had the sole right within themselves to decide, it being, in whatever form it may arise, a question of wisdom and sound judgment, not of doctrine, belief or constitutional power and the avrements of the bill upon this question afford no ground of intervention whatever to this court.

And for answer to the bill, not waiving their foregoing demurrer, defendants say as follows:

That they admit that the Cumberland Presbyterian Church was organized February 4, 1910, as a religious denomination, in Dickson County, Tennessee; that the organization grew out of a serious, and at that time irreconcileable difference in doctrine which arose between certain members of the Presbyterian Church; but they deny that the differences in doctrine and polity mentioned in the bill were finally irreconcileable and they aver that these differences have been substantially reconciled and the causes for separation which existed in 1810 and for ninety-three years thereafter, have been removed.

Defendants aver that the Cumberland Presbyterian Church was organized by a secession at first of three ministers of the gospel from the Presbyterian Church in the United States of America; and that the objection which the founders of said church had to the Westminster Confession of Faith, which at that time was the creed of the Presbyterian Church in the United States of America, was that it
seemed to set forth the doctrine of fatality. Defendants deny
154 that said Presbyterian Church in the United States of America now has as its standard of faith the Westminster Confession of Faith as it was in 1810 and they aver that its present standard of faith is the Westminster Confession of Faith with certain alterations and revisions of very far reaching import, which have had

the effect, substantially, of eliminating therefrom the doctrine of fatalityn which was the cause of seperation from said church on the part of those who founded the Cumberland Presbyterian Church.

Defendants admit that in 1829 the general assembly of the Cumberland Presbyterian Church appointed a committee of publication, which was directed as its first duty to publish five thiusand copies of the Cumberland Presbyterian Confession of Faith, but they aver also that this same Confession of Faith was the Westminster Confession of Faith which was the standard of faith of the said Presbyterian Church, with a few changes eliminating the doctrine of fatality; and they were that this standard Westminster Confession of Faith so changed continued to be the standard of faith of the Cumberland Presbyterian Church until the year 1883, when a new confessional statement was adopted, which set forth the same system of theology in brief-r form.

In order more fully to show to the court the motives attending the origin of the Cumberland Presbyterian Church, defendants aver that its object was not sectarian or controversial, but in order to provide a means of reaching and supplying the religious and spiritual means of a large and increasing population in the southern and central western country in those pioneer days. It was time of crudeness in social life and religious life; churches and schools houses were few and far removed from each other and there had been a decade or more previously a wave of infidelity reaching over the country as a result of the influence of the French revolution and the doctrines of Thomas Paine and other noted infidels. In the latter part of the 18th century and the beginning of the 19th century a part of the territory now comprising Middle Tennessee and Kentucky was called the 'Cumberland Country.' In the beginning of the 19th century there developed in this 19th (sic. Clk.) Cumberland Country an extraordinary religious awakening which was afterwards known as the revival of 1800 (sic. Clk.). This revival was originated and promoted largely through the Christian activity of a large number of ministers and laymen of the Presbyterian Church, who were afterwards known as the "revival party". The revival movement and especially its methods was opposed by some of the most conservative Presbyterian ministers and laymen of the Cumberland country. They soon became known as the "Anti-Revival
155 Party". There were not enough ministers in that section of country to efficiently carry on the revival work and the emergency did not allow time to educate new ministers according to the Presbyterian standard of education. Devout laymen in some instances undertook, under these peculiar circumstances, to explain and enforce the teachings of the gospel and their efforts proving successful, Cumberland Presbytery of the Presbyterian Church ordained them to the full work of the ministry.

These young men in their evangelistic work naturally made prominent and emphatic the free agency of the individual in accepting the plan of salvation. In this way their attention was especially challenged to the teachings of the Westminster Confession of Faith as to the doctrines of election, fore-ordination, the eternal

decrees and the correlated doctrines. These teachings were expressed in such language as to be capable if a construction that involved doctrines of fatality. The ordination vows of the church required candidates for ordination to declare that they received and adopted the Confession of Faith as containing the system of doctrines taught in the holy scriptures. These young men claimed the right to make this declaration with the explanation that they did not understand the Confession of Faith as teaching the doctrine of fatality and if it did so teach, they accepted the confession with that doctrine excepted. The anti-revivalists objected to this qualified declaration. They appealed to the synod and the synod undertook to revoke the ordinations. The presbytery denied the constitutional right of the synod to make the revocation and ultimately the synod dissolved the presbytery. The controversy continued until the revivalist party became satisfied that they could not, without the sacrifice of principle, remain longer in the Presbyterian Church. Accordingly on the 4th day of February, 1810, at the residence of Samuel McAdow, a log cabin in Dickson County, Tennessee, three ministers of the Presbyterian Church, Finis Ewing, Samuel King, and Samuel McAdow, organized an independent presbytery, calling it Cumberland Presbytery and this was the beginning of the Cumberland Presbyterian Church.

Its founders hoped and expected that the presbytery thus formed would, in a short time, threafter, become reunited with the Presbyterian Church. They deprecated separate denominational existence, avoided it as long as possible, took the step with great reluctance and fondly cherished the hope that the separation would be of short duration. They expressly adopted the Westminster Confession of Faith and the Presbyterian constitution and other doctrinal and ecclesiastical standards except the doctrine — fatality.

156

The presbytery ordered that all candidates for licensure and ordination should adopt the confession "except the doctrine of fatality." The presbytery grew until it was divided into three presbyteries and these presbyteries were in 1813 organized into a synod called Cumberland Synod. The synod in 1829 was divided into three synods and organized into a general assembly. From 1910 to 1813 Cumberland Presbytery was the highest judicatory of the church and from 1813 to 1829 Cumberland Synod was its highest judicatory. Defendants admit that in 1847 the general assembly emerged its committee into a board of publication and prescribed for its certain rules, some of which are set forth on page 3 of complainants' bill.

It will be seen by reference to these rules that the plan of the board of publication contained nothing that was sectarian; that its object was to provide a means of publication and dissemination of religious literature and that the profits therefrom were to be used in more widely extending and disseminating said literature and promoting and advancing the work of the church. It will be further seen that nowhere in the plan of the board of publication or in any acts of the general assembly was it provided that the property held and to be held by said board in trust was to be used in any other way than to promote the work of the church and aid that church as an

instrumentality in furthering the cause of the kingdom of God; and that no special — attached to it for the teaching of any other than what is known as the orthodox evangelical system of doctrine.

Defendants admit that thereafter a number of agents solicited funds over the church at large for the benefit of this board of publication, but they aver that whatever was thus acquired was afterwards completely lost and that at the close of the civil war said board of publication began business with substantially no assets. They admit that in 1878 and afterwards the general assembly laid down rules for the government of the board of publication and that it has frequently and almost annually exercised a careful oversight over said board of publication, electing its members under the provisions of its charter and that the general assembly of the Cumberland Presbyterian Church had ample power over the management of said board of publication and even the power to remove its members when it should see fit to do so.

Defendants admit the allegations of the bill as to the incorporation of a board of publication in Kentucky and the removal of its property to Tennessee about 1860 and the transfer of same to the board of publication of the Cumberland Presbyterian Church and that since 1860 the members of said board of publication have
157 operated under a charter of the State of Tennessee, being chapter 167, sections 34 and 35, Acts of 1859-60, of the General Assembly of the State of Tennessee and they suppose that the said charter is correctly set forth on page- six and seven of complainants' bill.

Defendants deny that said board of publication after 1860 continued its work without a break and they aver that during the civil war its assets were removed to Pittsburgh, Pennsylvania, and the publishing interests were maintained in said city until about the year 1867, when what few assets were left were removed back to Nashville, Tennessee; and they admit that since that time the work of said board of publication at Nashville has continued without interruption.

Defendants admit that under the directions of the general assembly collections were formerly taken, in the -arly period of the work of said board but they aver that long ago such collections ceased and became unnecessary, and that also no gifts were made by any parties of the said board of publication impressed with any terms or conditions constituting a special trust for the promulgation of any particular or distinctive doctrines.

They aver that all of the property that came to said board of publication by gift, devise, or bequest, was given entirely to said board in its corporate capacity to enable it to do the regular work which it had been organized to do under the direction of the general assembly of said church.

Defendants deny the statement in the bill *t* that whatever property said board now has was received from the church at large, but they aver that a large portion of the property held by the said board was acquired by prudent, careful, faithful business management in the operation of a publishing house in serving the church at large

in conducting a commercial enterprise in the printing and publishing business. In other words, a large proportion of said property is the accretions resulting from such prudent, faithful and prosperous management of said business. Defendants deny that said board was created and funds contributed to be used alone in the dissemination and promulgation of the distinctive doctrines of the Cumberland Presbyterian Church, but they aver that the primary purpose was the publication and dissemination of a cheap and sound Christian literature for the spiritual welfare of the church and for the enlightenment of those who were not in the church of professed Christians and to aid the Cumberland Presbyterian Church in doing its part in the christianization of the world.

158 Thus it will be seen that the purpose of the board was much broader than that set forth in complainant's bill and that it had and still has a more important mission than that of a controversial or sectarian character. Said board has distributed and published far more of literature of a general non-sectarian sort than of literature which dealt particularly with the distinctive doctrines of the Cumberland Presbyterian Church. Defendants admit that the property of said board of publication is held in trust and has been used since its origin to widen the influence, increase the membership and educate the members of the church in the doctrines of the church, but they aver that the larger and primary purpose of the trust has been the extension of Christianity, the establishment and building up of Sunday Schools, missionary societies, etc., and the general promotion of christianity and brotherly love in the world. They admit that said board has held itself out as the servant and agent of the Cumberland Presbyterian Church, as a practical instrumentality in the doing of good in the world and that the said board has held the legal title of the property in trust for the use of the Cumberland Presbyterian Church and so holds it at the present time. Defendants aver that the Cumberland Presbyterian Church as organized in 1810 was in the year 1906, finally united in a proper, regular and valid way with the Presbyterian Church of America, from which the Cumberland Presbyterian Church had originally been formed by separation and they aver that the rights, powers and authority of the general assembly of the Cumberland Presbyterian Church as provided in the charter of said board have, by virtue of said action, been transferred to and become attached to the general assembly of the Presbyterian Church in the United States of America. They aver that the religious society represented by the relators is not the Cumberland Presbyterian Church mentioned in the charter of said board, organized in 1810 and continued thus as a separate body until 1904, but that said religious society is a new and entirely different organization, having the same name, composed almost entirely of those who refused to be bound by the action of the general assembly and the presbyteries of the Cumberland Presbyterian Church, but who seceded therefrom and formed this new organization in the year 1906 out of schism and secession; and defendants aver that the general assembly which met in Dickson, Tennessee, in 1907, has no right, power or authority over said

board of publication and the members thereof. They aver that their relation to the general assembly of the Presbyterian Church is not that of pretense, but that the relators in this cause are pretending themselves to represent the Cumberland Presbyterian Church
159 which was organized in the year 1810, when they have no warrant of authority for so doing.

Defendants admit that the corporation known as the board of publication owns a lot or parcel of land in Davidson County, Tennessee, which they suppose is correctly described on page seven of the bill. They admit that the plant, business offices, store, printing office and equipment of said board are very extensive and of great value and they aver that they have been accumulated and made thus valuable by prudent and prosperous management and largely by the sympathy and co-operation and support of that element of the Cumberland Presbyterian Church which favored the aforesaid union of the churches and abided by the action of the duly constituted authorities of the church.

Defendants admit that under the charter of the board of publication the general assembly of the Cumberland Presbyterian Church was authorized and empowered to elect the directors or members of said board and to change the same at pleasure; and they aver that since the month of May, 1906, this authority and power has been vested in the general assembly of the reunited church known as the Presbyterian Church in the United States of America.

The defendants aver that as constituting said board of publication they are and have been carrying out the policies of the Cumberland Presbyterian Church and advocating its doctrines and that in fact said board of publication is one of the arms of the church. They aver that being subject to the general assembly said board and its members have obeyed the mandates of said general assembly and hold themselves at all times subject to the action of said general assembly and the presbyteries, so that said board and its members have been and are duly complying with the provisions of its charter and the rules and regulations of the general assembly of the Presbyterian Church of the Cumberland Country and consequently the general assembly of the Presbyterian Church of the United States of America. They aver that the said reunion of the churches has not in any manner changed the identity of said board or its work or the purpose for which it exists. They aver that by the express terms of the union of the churches the two denominations have become united as one church, possessing all the legal and corporate rights and powers which the separate churches possessed before the union.

Defendants deny that they are wrongfully and unlawfully claiming to be the lawful and regular directors and members of said board. They admit that they are assuming to exercise the
160 powers conferred upon said board and are holding this property and they aver that they are doing so rightfully, lawfully and regularly and that the relators have no right to question their said rights and powers. As to the action taken by the general assembly of the so-called Cumberland Presbyterian Church held in

Dickson County, Tennessee, in May, 1907, defendants suppose that it is true that said general assembly did undertake to pass the resolution set forth on page- nine, ten and eleven of the bill, but they deny utterly and totally the right of said general assembly to pass said resolutions, and they deny that said resolutions have any power or effectiveness whatever. They deny the recitals in said resolutions, especially that defendants are diverting the property, assets and buildings of the board of publication to any other purpose than those for which they have been acquired. They deny that they are guilty of any violation of the trust reposed in them. They deny the right of said general assembly to depose or remove defendants and declare their office- as members of said board vacant, or to prohibit defendants from exercising any of the rights or powers heretofore possessed by them by reason of their election or appointment as members of said board of publication of the Cumberland Presbyterian Church. Defendants deny the right of the relators to be appointed, elected or constituted as members of said board of publication, or as such to have and possess any of the powers, rights or privileges conferred upon the board of publication of the Cumberland Presbyterian Church by sections 34 and 35 of chapter 167 of the Acts of the General Assembly of the State of Tennessee of 1859-60 and the amendments thereto. They deny the right of relators to take and possess any of the property whatsoever to which said board is entitled. They deny the right and authority or power of the relators to depose or remove them from said board and they deny that they are endeavoring to transfer the property of said board to any other purpose whatever than that for which it has been acquired and for which they have been ordered to use it by the General Assembly of the denomination to which they are subservient as constituting said board of publication. Defendants deny the right of relators or of any other body of individuals or of any other corporation to take and use the property which is held in trust by them as constituting said board of publication.

Defendants suppose it is true that the relators addressed communications to them, but they deny that they were under any obligations whatsoever to make any answer. They simply declined to vacate their offices which were entrusted to them and they aver that whenever they may vacate the said offices they will do so to
161 the ecclesiastical body which has power over them under the charter of said board.

Defendants deny that they have denied allegiance to the Cumberland Presbyterian Church individually and as a board and they aver that they have been faithful and obedient to the orders and mandates of the general assembly of the Cumberland Presbyterian Church and of the Presbyterian Church in the United States of America. Defendants admit that said board by and through them is now submitting itself to the direction of the Presbyterian Church in the United States of America, but they deny that said board has, through any direction whatsoever, abandoned the publication of Sunday school literature and they aver that they are publishing and disseminating more and better Sunday school literature than ever be-

fore. They deny that the policy of said board is to cease to publish literature that is of such character as tends to promote the work of the religious denomination to which said board is lawfully subservient. They aver that their policy is not to cripple or destroy the work of the Cumberland Presbyterian Church.

They aver that the Cumberland Presbyterian Church exists as a part of the reunited church and that said board and defendants are endeavoring faithfully and earnestly to enlarge the work of said reunited church and to promote the doctrines to which it subscribes and which are in harmony with the doctrines adhered to by the Cumberland Presbyterian Church which was organized in 1810.

Defendants admit the historical statement set forth on pages 12, 13, 14, 15 and 16 of the bill, which is the preface to the Confession of Faith and government of the Cumberland Presbyterian Church adopted in 1883. However, defendants aver that said statement was only a declaration of the general assembly in 1885, when the Presbyterian Church had not revised its confession of faith. Defendants aver that, although in the year 1883, the Cumberland Presbyterian Church did adopt a new confessional statement, its general assembly, in submitting to the presbyteries the question of adopting the new confessional statement, did so with an agreement that the members of the church might have the option of adhering to the revised Westminster Confession of Faith, which was adopted in 1829, the language of said resolution being as follows:

"It being hereby distinctly understood and declared that those who have heretofore received and adopted the Confession of Faith approved by the general assembly in 1829 and who prefer to adhere to the doctrinal statements contained therein, are at liberty so to do."

It will thus be seen that the revision of the confession of
162 faith was not for the purpose of introducing new doctrines or system of doctrines, but for the purpose of obtaining a briefer and probably somewhat clearer statement of belief. This was because at that time — no indication that the Presbyterian Church would revise its confession of faith so as to eliminate therefrom the doctrine of fatality which seemed to be therein taught and was the sole theological issue between the two denominations in their confessions of faith, although defendants aver that it is a matter of common knowledge among the members of both churches that the Presbyterian Church had for a large number of years insisted that it did not in its creed intend to teach the doctrine of fatality and its members have insisted largely that their belief upon this subject was the same as that set forth in the confession of faith of the Cumberland Presbyterian Church. It is thus seen that since the year 1883, conditions have radically changed and defendants aver that a situation has resulted which, if it had existed in 1810, in the Presbyterian Church, would have caused the fathers of the Cumberland Presbyterian Church to remain lawful and faithful members of the Presbyterian Church in the United States of America. Defendants aver therefore that the intimation in the bill that the Cumberland Presbyterian Confession of Faith was lightly considered and indifferently cast away is erroneous and misleading and not true.

They aver that while the Cumberland Presbyterians who went into the union of the churches perhaps preferred the Cumberland Presbyterian Confession of Faith as a statement of their belief, yet they considered that the beneficent effect of reunion was so great and the confession of faith of the Presbyterian Church was substantially so similar, that the benefits of reunion far outweighed the matter of preference for the simple form of the confessional statement.

Defendants aver that in the year 1906 the Cumberland Presbyterian Church did finally adopt a new constitution and form of government and confession of faith, in the exercise of the powers conferred upon it by its constitution and the powers inhering in it as a voluntary religious association; and that it changed its name and became reunited with the Presbyterian Church in a lawful and constitutional manner, as will hereafter be fully set forth. They aver that all the members of the Cumberland Presbyterian Church were bound by the action of the general assembly and the presbyteries according to their vows and agreements as members of said denomination. It is true that by May, 1906, said church had extended its influence until it had a large number of congregations, ministers, presbyteries, synods and members, as set forth on
163 page 17 of the bill. Defendants deny that they are responsible for the interruption of the peace and harmony of this church and they deny the intimation in the bill that the organization represented by the relators is the same denomination only with its membership somewhat diminished. They aver that said organization has arisen out of an unreasonable and unnecessary schism and controversy and disobedience to the authorities of the church. They aver that the members of said organization participated in all the actions of the general assemblies and presbyteries of the Cumberland Presbyterian Church upon the proposed union, that they found themselves in a minority and that when the proposition was carried in the face of their opposition, they refused to be bound by it, rebelled against the authorities of the church and left the church in open defiance of its authority and in a spirit of schism and secession.

In order that the history of the movement for union and reunion may be properly given and in justice to themselves and to those loyal members of the church with whom they affiliate and who have become members of the reunited church because they believe that they can thereby better perform their duty as professed Christians, defendants will now set forth as clearly and accurately as they can.

The best informed and most efficient members of the church from its organization down to 1903 were convinced that the cause of Christianity would be promoted by a union of all branches of the Presbyterian family in the United States. The highest judicatories of the church repeatedly participated in negotiations for an organic union with other denominations, notably with the Presbyterian church north and the Presbyterian Church south, but invariably the differences in the creeds of the negotiating churches on the subject of predestination proved to be the one impediment in the way of union. Many attempts of this sort were made, but each attempt at

a union was abandoned with reluctance and regret. However, in the year 1903 the Presbyterian Church in the United States of America completed a very important and far-reaching revision and construction of its confession of faith which removed all grounds for the contention that it contained doctrines of fatality. This revision was incorporated organically into the Confession of Faith, partly by the addition of new chapters by amendment and partly by a declaratory statement interpreting those sections of the old confession of faith apparently teaching fatality to show that the church did not hold to the doctrine of fatality. These additions to the confession of faith became, therefore, integral parts thereof and wherever their declarations were in conflict with these chapters and state-
164 ment must be taken as expressing the belief of said church finally upon the theological questions therein mentioned. These additions thus superseding parts of the old confession of faith not only eliminated therefrom the doctrine of fatality, but also set forth in a full and comprehensive manner the doctrine of full, free and universal ato-ement for all who would accept it, as was taught and insisted -pon by *by* the members of the Cumberland Presbyterian Church from the beginning. It is thus seen that the confessional statement of the Presbyterian Church is substantially the same as that of the Cumberland Presbyterian Church. When this revision was made the greater portion of the ministry and membership of the Cumberland Presbyterian Church realized that no reason longer existed why the long desired union between these two churches should not take place and the general assemblies of the two churches, which convened in *in* 1903, each appointed a committee to confer with each other on the subject of organic union. The Cumberland Presbyterian Church appointed a committee without a dissenting voice and when the resolutions were adopted the whole general assembly arose in a spirit of rejoicing and indulged in prayer and song over the prospect of a reunited Presbyterianism.

It was felt that the historic position which had been maintained for more than ninety years by said church had been vindicated. A committee composed of leading ministers and laymen of the church was then appointed. The defendants deny that this committee was appointed over the protesting overtures of a large number of presbyteries and commissioners. They deny that any of said overtures were suppressed. They aver that such overtures as were presented to the assembly were very few in number and were duly acted upon adversely by the assembly so that there was no wrong done or advantage taken by any one. The committee appointed was representative of the entire church, its boards and institutions of learning and was selected with great care and precaution. Its chairman was a man of superior ability, scholarship and integrity and so were all the other members of said committee. The general assembly of the Presbyterian Church in the United States of America which convened in 1903 appointed a similar committee and the two committees met in St. Louis, Missouri, and devoted four days and nights to the consideration of the important question submitted to them. They appointed sub-committees which met two months later in the city of Cincinnati for the

agreement of details and these committees remained in session three days. The final result was that the two committees agreed upon a joint report to be submitted by the separate committees, each to its own general assembly, recommending that a union between
165 the two churches be consummated upon a basis set forth in the report. The said joint report is hereto annexed marked exhibit No. 1. This exhibit and all others hereto annexed are made part of this answer.

This report was adopted by the general assembly which met at Dallas, Tex., in 1904, by the passage of the two resolutions which are hereto annexed and marked exhibit No. 2. The said resolutions were debated for several days with great ability and thoroughness by leaders on both sides. The total number of commissioners or delegates to said general assembly was 251. The total number voting on the resolutions was 236. The vote stood 162 in favor of the resolutions and 74 against them. At the time said resolutions were adopted the general assembly of the Presbyterian Church had not acted and as it could not be absolutely known that it would adopt the report the Cumberland Presbyterian assembly directed its moderator and stated clerk to submit the basis of union contained in the report to the presbyteries upon *the* receiving final notification that the Presbyterian assembly had adopted the report.

Defendants deny that there was any understanding or agreement that no vote should be taken on said resolutions at the night session as charged in the bill and they deny that there was any confusion or misunderstanding as to the effect of the same. They deny particularly and emphatically that when the presiding moderator was requested to rule upon the scope of the resolution he stated that the effect was merely to submit the questions to the presbyteries without recommendation. They aver that the only statement made by the moderator on this subject was when he was asked publicly whether or not if a commissioner should vote in the assembly in favor of the resolutions it would prevent him from voting against it in his presbytery and he replied that it would not. Defendants aver that this particular statement did not mislead any one and that if eight members voted in favor of the resolutions who were opposed to them, they did so purely for the purpose of getting the resolutions before the presbyteries and not because they were misled. Defendants aver that said resolutions were plain and clear, that they constituted a recommendation of the basis of union by the general assembly. Defendants aver that the unionists have never claimed otherwise than that they constituted such recommendation, although the basis of union was submitted to the presbyteries expressly for their approval or disapproval.

In order that the presbyteries of the church might be fully informed in regard to the revised confession of faith of the Presbyterian Church referred to in the joint report the revised por-
166 tions were printed in the minutes of 1903 of the general assembly of the Cumberland Presbyterian Church. The unrevised portion, having for seventy-three years been a part of the creed of the Cumberland Presbyterian Church, was already familiar

with its members. A copy of said minutes was sent to every minister, candidate and licentiate in the denomination and to the clerk of every session, as well as to the stated clerk of every presbytery and synod. The Presbyterian General Assembly of 1904 also adopted by a vote almost unanimous said joint report and submitted the basis of union therein contained to its presbyteries for their approval or disapproval. It also adopted and submitted to its presbyteries for approval or disapproval an amendment to the constittuion of that church providing for the separation of the races in all of the church courts except the general assembly. The moderator and stated clerk of the Cumberland Presbyterian general assembly, pursuant to the orders of the assembly, addressed to every presbytery a communication submitting the basis of union to them for their action.

Defendants admit that the submission of the basis of union was in the words quoted at the foot of page 44 et seq., of complainants' bill. They aver, however, that said communication incorporated into itself the whole basis of union already referred to, which had been printed in the *the* minutes of the general assembly of 1904 and sent to all of the ministers, stated clerks of sessions, and presbyteries and synods of the church; so that said basis of union was promulgated everywhere and was thoroughly known and considered in connection with the proposition submitted to the presbyteries in the aforesaid language. Defendants, therefore, deny that the question thus propounded to the presbyteries was insufficient or that—was without the essential elements of an amendment. They aver that this proposition plainly and clearly involved the abandonment of the constitution and confession of faith, rules of discipline and other standards of the church and the substitution thereafter of the like standards of the Presbyterian Church. Defendants deny that this proposition was wanting in *in* any particulars essential to a valid proposition for that purpose and looking towards the reunion of the two denominations.

The question as to whether the basis of union should or should not be adopted by the presbyteries was most exhaustively discussed for almost one entire year through the official organ of the Cumberland Presbyterian Church at Nashville, called the "Cumberland Presbyterian," in which as much matter was published emanating from opponents of union as from the advocates of it. During this time, contrary to what their conduct — 1903 had generally
167 given reason to believe, the element of the then *then* Cumberland Presbyterian Church represented by the relators began a campaign of most fierce, unfair*m*, bitter and unreasonable opposition for the proposition of union. They held a conference in 1903 and soon thereafter began the publication of literature of a violent and unreasonable character, filled with denunciation, abuse and unfair statement-. This sort of methods coupled with their unfair statements soon told upon the minds of a considerable number of people who had not read carefully or discerningly the revision of the Presbyterian confession of faith, the history of the movement for reunion, the basis of union, the report of the committee or other literature bearing upon this important question. They accepted all statements of opponents of union as true and were through their

sentimentality imposed upon by them, so that the movement in opposition began to take very positive form. Some of the details of this opposition will be hereafter referred to in order to show how it became as strong as it was. Both the champions and opponents of the church union flooded the church with circular literature and the questions involved wrre discussed by the presbyteries, synods and from the pulpit and in private conversation. A more universal and exhaustive discussion of any measure is practically impossible. The presbyteries made report to the general assembly through its stated clerk and these reports were received by the clerk and sumitted to the general assembly of 1905, which met at Fresno, California. The defendants deny that when the question came to be voted on in the presbyteries several Cumberland Presbyterian ministers resorted to double voting with a view to enhancing their chance. Defendants aver that this charge is wholly untrue, as is also the charge that this so-called double voting was part of any plan instituted or carried out by the campaign committee for the unionist element known as the voluntary committee on uni-nist information. In order that the facts may be fully known and the utter lack of any substance for this charge may be realized, defendants aver that the only instance on record or ever heard of where any minister favoring the union voted twice, was in the case of Rev. G. P. Howard, who was a member of Chickasaw Presbytery; on October 4, 1904, voted in said presbytery for union, when the vote stood fifteen to eleven for union. Afterwards, changing his residence, he moved to Cher-kee Presbytery and became a member thereof. At the next meeting of Chickasaw Presbytery the question was reconsidered and said presbytery voted against the proposition. When the question was reached in Chickasaw Presbytery in the spring of 1905, Mr. Howard voted in said presbytery in favor of the union and his vote did not de-
168 cide the action. Thus it is seen that he did not vote at all in Chickasaw Presbytery at the time when the action was taken which was final action of said presbytery and reported to the general assembly; and it is seen that he cast only one vote upon the proposition which counted in the result. This matter was made the subject of a complaint by the anti-unionists to the general assembly at Fresno, in 1905, and this general assembly sustained the course taken by Mr. Howard. Thus it is seen that there is absolutely no foundation for such a charge and that it is trivial and even ridiculous.

Defendants deny that the union was brought about by fraudulent political methods or by any action intended to override or which did override the will of any of the members of the Cumberland Presbyterian Church. They deny that the circulars referred to on page 23 and 24 of the bill was a secret circular and they admit that it was widely sent out and distributed by the secretary of the voluntary committee on union information. They aver and insist that there was nothing improper in said circular, that it was made necessary by reason of the systematic campaign of violent abuse, unfair statement and even misrepresentation which was being carried on by the opponnents of union, blinding the eyes of a large number —

people to the real merits of the proposition and making it impossible in many places for the proposition to receive anything like a due and fair consideration. It was necessary for the friends of union to be urged that where this campaign had been effective they should endeavor to secure a postponement of action in order that the real truth concerning the proposition might be set forth and understood. It was a time when the advocates of union were treated in the most unchristian manner, were abused and vilified from the pulpit and in private conversation, their characters held up and condemned and their names became the signal for ridicule and contempt. It was very necessary, therefore, in order that justice and truth might triumph for this circular to be sent out, publicly and not secretly and there was in it no element of fraud or wrong doing. Defendants aver that some time before this circular was issued the campaign committees of the anti-unionists, composed of relator, J. H. Fussell, T. A. Havron, and J. N. Parker, issued a circular styled "special instructions", in which they urged their sympathisers everywhere to organize and prosecute an active canvass in opposition to the union and advised that if it seemed probable or certain that presbytery would vote "aye" on the question, those opposed should get excused from voting for the reason that they would not propose to be bound by the movement; and that protests be entered, etc. This circular was very elaborate and full of suggestions that every effort be
169 made, whether by political method or otherwise, to thwart the movement in favor of union. It is thus seen that where a systematic effort was being made, employing such methods as those already set forth, it was necessary that a definite campaign be outlined and maintained by those who thought and thought honestly, that the union movement was a righteous and beneficent movement for the better advancement of the kingdom of Christ.

This is also true of the circular sent out by J. M. Patterson and referred to on page 25 of the bill. At the time this circular was issued the opposition had paid agents and representatives in nearly all parts of the church who were disseminating the same violent abuse, gross misrepresentation and unfair statement hereinbefore referred to, and said circular was sent out purely as an individual matter and not by reason of any action taken by any official body of the church. Said circular was merely a circumstance in the whole campaign and was abundantly justified in order that the proper effort might be made to prevent the utter overthrow of the truth in regard to this movement. On the other hand the opponents of union for a period of two or three years were constantly sending out circulars filled with the same bitter and unfair statements as are hereinbefore referred to. They publish and still publish a paper called "The Cumberland Presbyterian Banner", which weekly dealt in such — as would put an ordinary political campaign to shame. Its practice has been to fill its columns with charges against the union movement and frequently with libellous charges against its leaders and sympathizers that it could not maintain and did not attempt seriously to sustain when they were challenged. This paper has been circulated widely through the church and has

had a very large part in influencing those who did not understand the facts to take a position in opposition to the union.

In order to account somewhat for the magnitude of the opposition of this movement defendants will state specifically some of the methods employed by the anti-unionists and their leaders and campaign committees. When the vote was being taken in the presbyteries upon the union proposition in 1904 and 1905, in those presbyteries where the anti-unionists were likely to control, they repeatedly and in many places resorted to the practice, improper and irregular, to say the least of it, of procuring persons to go to the presbyteries purporting to represent as delegates congregations that had hithreto become defunct and gone out of existence as organizations. Then they would sustain the claims of these persons to sit as delegates and allow them to vote in opposition to the union.
170 This was done not only once but many times in such presbyteries. Everywhere the emissaries and active leaders of the opposition told the people both publicly and privately that if they should go into the union they would have to sit side by side in the church with negroes and they did *did* not explain to them that the Presbyterian church had adopted an amendment to its constitution providing for placing negroes and members of other races in separate presbyteries and synods from the white pe*p*ole; and they failed to recognize that in any particular congregation the session had a right to refuse to admit any one whom it might please as a member of said congregation. Likewise they stated that the northern Presbyterian church was endeavoring to destroy the Cumberland Presbyterian Church and take its property away from it. Likewise they stated that the leaders of the union movement had been bribed in one form and another and the charge was shamelessly and falsely made that this board of publication had sold out under an agreement that it would receive one hundred thousand dollars, when no such offer was ever made, or intimated, nor would it have been considered be any one in any way. Likewise in order to pray upon*t* the passions of the rural members they stated everywhere, orally and in circulars and newspapers that the policy of the Presbyterian Church was th*e*n when a congregation should become unable to pay as much as two hundred and fifty dollars a year for pastoral support that con*g*ergation would be left without a pastor or supply and after a few years would be dissolved; as a fact the majority of the congregations of the Presbyterian Church were and are in the smaller towns and country districts; it is its custom and policy to care for every church either through the Sunday school home missionery committees or the presbyterian board of home missions and at that very time said church had on its roll more than a thousand congregations which were unable to pay anything toward the support of a pastor and were sustained by home mission agencies. It has always been the policy of said church to nurse weak congregations without the slightest reference to the amount which they were able to pay although they encourage said congregations to contribute what they can.

They issued circulars comparing the majority favoring union to the majority which perished in the destruction of Sodom and sought

thereby to justify their declaration that they would not be governed by the action of the majority. They threatened from the very beginning to endeavor to hold all the property of the church to the end of long and expensive litigation and they urged their sympathisers
everywhere to remain in congergations that were overwhelm-
171 ingly in favor of union in order that if the property should
be awarded to them they might dispossess such majority and hold the property, although no more than one of them might be left in the congregation. They appealed in every possible way to sectional prejudice and passion, sought to revive the dead issues which were rife in the days of the civil war and reconstruction and endeavored to liken this movement and their opposition to conditions which then prevailed. They impugned the motives and honesty of all who had anything material to do with the union movement. The chairman of their campaign committee, who is now the moderator of their general assembly, sent out thousands of circulars in envelopes on the outside of which was printed a series of statements characterizing the union movement as "Satan's best friends," "Truth's worst enemy," and charging the unionists with selling out and many other such statements. Their leaders urged them to close their houses and churches against all speakers favoring union and not to listen to them and also to burn up without reading it all union literature which might be sent to them. In these and many other ways they sought to inflame the passions and prejudices of people and they soon brought it about that a large number of people who had not fairly investigated the facts became utterly blinded to them and satisfied with these statements would not listen to any statements of the proposition by unionists or read any literature sent out by the unionist element. They made them believe their personal liberty was infringed upon and their consciences were violated. They ignored the real spirit of the movement; they utterly misrepresented the Presbyterian Church. They stated everywhere that it had not changed in any way its creed and it was a common practice for them to read to audiences those parts of the Presbyterian confession of faith, which seemed to teach the doctrine of fatality, but which was superseded by the new chapters and the declaratory statement, which teach clearly the doctrine of universal atonement. By the practice of these methods they succeeded in developing a large and formidable and contentious opposition and in drawing the sympathy of a large number of people of blameless character and undoubted loyalty theretofore, who were honestly misled by them.

The general assembly of 1905, at Fresno, referred to a special committee the reports from the presbyteries for their respective votes upon the union proposition. The committee made a majority and a minority report; both of them concurred, however in finding that sixty presbyteries had approved the basis of union and fifty-one had
disapproved of it, two of *of* the 114 presbyteries taking no
172 final action and one not reporting. Said majority report
was adopted and its recommendations concurred in. A copy of the preamble and resolution, reported by the committee and adopted by the general assembly, is hereto annexed and marked

exhibit No. 3. By said resolution it was resolved by the assembly that it "does hereby find and declare that a constitutional majority of the presbyteries of the Cumberland Presbyterian Church have voted approval of the reunion and union of the said churches upon the basis set forth in said joint report, and does find and declare that said reunion and union has been constitutionally agreed to by the Cumberland Presbyterian Church and that the basis of union has, for the purposes of the union, been constitutionally adopted."

The general assemblies of the two churches continued their respective committees on organic union, the Cumberland Presbyterian assembly adding to its committee nine additional members, eight of whom up to that time had opposed union. This committee, so enlarged and continued, was directed to confer with the various boards, committees, organizations, and institutions of the Cumberland Presbyterian Church, "with reference to the adjusting of the details of union with the Presbyterian Church in the United States of America."

After two meetings the committees representing both churches unanimously, excepting one Cumberland Presbyterian member, adopted a joint report, a copy of which is hereto annexed, marked exhibit No. 4. Each one of the two committees incorporated the joint report in a separate report to its assembly. The Presbyterian Church convened on May 17, 1905, at Des Moines, Iowa, and the Cumberland Presbyterian general assembly convened the same day at Decatur, Illinois. On May 16, 1906, the anti-unionists presented to Hon. W. G. Johns, circuit judge at Decatur, Illinois, a bill seeking to enjoin the union committees of the Cumberland Presbyterian Church from presenting its report to the general assembly and seeking to enjoin the assembly from acting on such report. The defendants demurred to the bill. The application was elaborately argued on both sides and the injunction was refused and the bill dismissed. From this action of the court complainants appealed and the judgment of the circuit court affirmed by the court of appeals of Illinois some time thereafter. On May 23, 1906, the committee presented its report to the general assembly and the same was acted on by the adoption of the following resolution:

"Resolved, that the foregoing report of the committee on fraternity and union be accepted and that the joint report on union and reunion contained in said report be adopted."

173 The vote upon said resolution was 165 affirmative and 91 in the negative. The Presbyterian assembly at Des Moines, Iowa, was informed by telegram of this action and that assembly adopted said joint report and by telegram informed the Cumberland Presbyterian assembly of the fact and of the further fact that the Presbyterian assembly had made the declaration provided for in section 14 of the joint report. Thereupon the moderator of the Cumberland Presbyterian general assembly made the declaration that the basis of union was in full force and effect in the following words:

"The joint report of the two committees upon union and reunion and the recitals and resolutions therein contained and recommended

for adoption, having been adopted by the general assembly of the Presbyterian Church in the United States of America and the general assembly of the Cumberland Presbyterian Church and official notice of such adoption having been received by each of the said general assemblies from the other, I do solemnly swear and here publicly announce that the basis of reunion and union is now in full force and effect and that the Cumberland Presbyterian Church is now reunited with the Presbyterian Church in the United States of America as one church and that the official records of the two churches during the period of separation shall, be held and preserved as making up the history of the one church.

Thereupon as a result of a formal vote of the assembly the moderator declared the assembly adjourned sine die as a separate assembly, to meet as a part of the general assembly of the reunited church on the third Thursday in May, 1907, at the place chosen or to be chosen by the Presbyterian assembly. The Cumberland Presbyterian Church then became a part of the reunited church and its presbyteries duly and regularly sent commissioners to the Presbyterian general assembly which met in Columbus, Ohio, in May, 1907, and the reunited church has since May, 1906, in a proper and lawful manner, been taking all necessary steps to make the union effective and to carry out the articles of agreement which had been entered into, in order that the beneficient ends of union and reunion might be substantially accomplished.

The commissioners to the Cumberland Presbyterian Church who were opposed to the union sat in said assembly and participated in its proceedings until the close and voted upon the resolution for adjournment. Defendants deny that they had any right to treat said adjournment as illegal and ineffectual and endeavor to continue a session of the general assembly thereafter. And they aver that immediately upon said adjournment all of said commis-
174 sioners ceased to be commissioners under the law of the church and any proceedings which were held in the hall of the Grand Army of the Republic at Decatur, Illinois, by said opponents of union were wholly void as a continuation of said general assembly.

Defendants deny that there was no constitutional power in the general assembly and presbyteries of the Cumberland Presbyterian Church to form and accomplish such a union and that every step taken to that end as aforesaid by the general assembly and presbyteries of that church was in violation of its constitution, ultra vires and void. They aver that said union was not an act of self-surrender or self-destruction on the part of the Cumberland Presbyterian Church, but that it was merely a proper coming together in organic union of two large influential religious societies having substantially the same form of government and creed. They aver that the action of the general assembly and presbyteries was an authoritative adjudication of these questions and of the right under the constitution of the church to form such union. They aver that this action was not in any way dependent upon the law of the land, although not in violation of it, but entirely upon the law of the church and the

general assemblies and presbyteries had the right to construe and interpret the law of the church both as to theology and polity. They, therefore, aver that this action was within the power of the church and under the law of the land should be accepted by the civil courts as final and conclusive.

Defendants aver that under a proper and reasonable construction of the constitution of the Cumberland Presbyterian Church, construed in the light of the purpose for which said church was formed and the history and antecedents of the organization itself, a reasonable construction of the terms of the constitution gives to the general assembly authority to determine whether the teachings, doctrine and form of government of another organization are in accord with it, and, if so, to unite with such organization upon such terms and under such name as the judgment of the general assembly should dictate. They aver that not only in this act of union was this construction placed upon this constitution of the general assembly of the church, but previously such a construction was repeatedly made. In 1810, the founders of that church declare, "we would just add that we have it in view as a presbytery to *to* make another proposition to the synod of Kentucky, or some other, for a reunion. If we can obtain it without violating our natural and scriptural rights, it will meet the most ardent wishes of our hearts." Again in 1811, 1860, 1867, 1873, and 1885, efforts were made towards union with churches by the Cumberland Presbyterian Church through its general assembly and such union was repeatedly declared to be
174½ the earnest wish of this church. Defendants aver that in view of these things and of the provisions of the constitution, it cannot be said that the makers of this constitution intended to prohibit this union and the words used do not bear that construction.

Defendants aver that the enumeration of powers of the church courts on pages 26 and 27 of the bill and other provisions of the constitution of the church do include the power to form and accomplish a union with another church and especially the union which has been accomplished. They deny that section 25 of the constitution imposed a prohibition on the general assembly as to the formation of this union and they aver that the words therein: "the jurisdiction of these courts is limited by the express provisions of the constitution," is not an express restriction of the power of the general assembly and the presbyteries to certain specific subjects or equivalent to a positive prohibition against the exercise of any other powers. They aver that this provision has reference to the jurisdiction of the several courts as between said courts or at least they do not mean to say that the general assembly shall have no powers exc-pt those expressly enumerated in the constitution. They also aver that this section treats of the general assembly as a court simply and does not in any way touch the legislative or administrative powers of th-t body and they aver that while the decision of the general assembly as to its jurisdiction was judicial, yet the formation of this union was the exercise of the legislative and administrative power and that said church had a natural and inherent right

as an organization to unite with other and similar organizations, especially when it is considered that the purpose of such an organization is merely the advancement of the kingdom of Christ and it is the duty of such an organization to take whatever steps may seem necessary to that end.

Defendants deny the averments in the bill that the doctrines of the two churches at the time of the consummation of the union were or are now absolutely variant and irreconcileably antagonistic in any essential and substantial features. They deny that the differences that led to the formation of the Cumberland Presbyterian Church still exist in the main, but they aver that these differences are substantially obliterated.

Defendants deny that this court under the law of the land can assume jurisdiction of questions of theology or doctrine which have been thus entirely adjudicated by the proper court of ecclesiastical bodies, but they will show that anyhow the differences in doctrine have been substantially removed and that ther- was and is
175 ample agreement in doctrine between the two churches to warrant the union. Defendants aver that the parallel quotations from the confessions of faith in the bill are wholly unfair and improper and misleading. They aver that chapter 3 of the confession of faith of the Presbyterian Church in so far as it teaches the doctrine of fatality has been entirely superseded by the preamble and added chapters numbered 34 and 35 and the declaratory statement, duly adopted in 1903. These are integrally a part of the confession of faith of said church. Defendants aver that a proper and fair comparison should be made between what is quoted from the Cumberland Presbyterian confession of faith and these added parts of the Presbyterian confession of faith. In these added parts, which have superseded the third chapter, the doctrine of universal atonement is as fully taught as in any part of the Presbyterian confession of faith and they have the effect of entirely eliminating any teaching of fatality. Defendants aver that these added parts have also entirely superseded any teaching of fatality that may be found in the catechisms of the Presbyterian Church and that by these added parts the question of whether or not the doctrine of universal atonement as contained in the Presbyterian Confession of Faith must be tested. Defendants will not undertake to set up these in parallel columns, deeming it unnecessary, but they expressly refer in this connection to pages 138, 138*a*, 138*b* of the Presbyterian confession of faith, which is exhibit "B" to the bill in this cause. Defendants aver further that at the time of the adoption of these additional chapters and declaratory statement there was adopted by the general assembly of the Presbyterian Church what is known as "A brief statement of the reformed faith, which is intended as a general and popular statement of the system of theology of the said church," a copy of which is herewith annexed as exhibit No. 5.

It will be seen that this brief statement, while not made a part of the confession of faith is to be relied on as an interpretation of the confession of faith and teaches fully the doctrine of universal atonement. Defendants deny that at this time the Calvinistic doctrine

with its logical sequences so objectionable to Cumberland Presbyterians as so carefully excluded by them from their confession of faith of 1883, pervades the whole system of theology formulated in the present confession of faith of the Presbyterian Church. Defendants aver that it is unfair and improper to state that the Westminster confession of faith as it existed in 1789 and 1810, is now the confession of faith of the Presbyterian Church and they deny that the meaning is in no way affected or intended to be affected by the declaratory statement or chapters added in 1903. De-
176 fendants aver that said revision of the creed did no violence to the instructions given by the general assembly of the Presbyterian Church in 1901 to its committee on revision as set forth on page 38 of the bill. Defendants admit that the general assembly of the Presbyterian Church in 1904, passed the resolution set forth on page 39 of the bill; but it will be seen by reference thereto that it was intended by that assembly to declare simply that the integrity of the system of doctrine had not been impair-d and that the meaning thereof was that the Presbyterian Church in this act of revision had merely set forth in a clear and unmistakeable manner the fact that it believed in the doctrine of universal atonement and that it was not willing that its confession of faith might thereafter be interpreted otherwise. Defendants aver that the Presbyterian general assembly of 1906 at Des Moines, Iowa, passed a series of resolutions of which the following is a part:

"Inasmuch as the two assemblies meeting in 1904 did declare that there was then a sufficient agreement between the systems of doctrine contained in the confessions of faith of the two churches; therefore the change of doctrinal standards resulting from the union involves no change of belief on the part of any who were ministers, ruling elders, or deacons in the Cumberland Presbyterian Church. Further this assembly specifically declares that since the revision of 1903 by which the confession of faith was amended by change of its text, by a declaratory statement, and by additions, it is no longer allowable to interpret our system of doctrine in any fatalistic sense; nor are we willing to admit that any such fatalistic interpretation was ever warranted, whatever misapprehension may have existed in the mind of any person."

Defendants deny that the ordo salutis or the order of salvation and growth in grace as now taught in the Presbyterian confession of faith, is as set forth in the bill in this cause. They aver that the Cumberland Presbyterian confession of faith and the Presbyterian confession of faith teach respectively that the order of salvation is as follows:

Cumberland Presbyterian.	Presbyterian.
Divine Influence (Conviction.)	Conviction.
Repentance.	Repentance.
Faith.	Regeneration.
Regeneration.	Faith.
Adoption.	Adoption.
Sanctification.	Sanctification.
Growth in Grace.	Good Works.
Good Works.	

The question whether faith precedes or follows regeneration is not essential and to raise such question is mere theological hair-splitting.

177 Defendants therefore deny that the respective systems of doctrine of the two churches are in irreconcilable conflict and an effort to unite — merge the two must result in the absolute destruction of one or the paralysis of both. They aver further that *that* these are questions with which the Cumberland Presbyterian Church had the sole and unquestioned right under its constitution to deal and with which no civil court has any power to interfere.

Defendants deny that the policies of the two churches are not at all in harmony. As to the question of educational qualifications of ministers the presbyterian law allows each presbytery to satisfy itself as to the qualifications of ministers and it is the custom in nearly all of its presbyteries to accept credentials of good standing issued to members of other presbyteries. The Cumberland Presbyterian Church long ago prescribed high educational qualifications for its ministers, recognizing that it was only through an educated ministry that it could carry on its work. The Presbyterian Church is evangelistic and aggressive in all of its work and especially its missionary work, as was ever the Cumberland Presbyterian Church and there is no difference in the two denominations in this regard. Defendants aver, however, that this also is a question the determination of which lay entirely within the power and province of the Cumberland Presbyterian Church and with which the civil courts have no right to interfere.

Defendants deny that the two churches are wholly diverse on the race question and they deny that negroes are admitted upon equality with white members in the synods and presbyteries of the Presbyterian Church. They aver that the Presbyterian Church in 1905 duly adopted the following amendment to its constitution:

"In exceptional cases a presbytery may be organized within the boundaries of existing presbyteries, in the instance of ministers and churches speaking other than the English language, or of those of a particular race; but in no case without their consent; and the same rule shall apply to synods."

Defendants aver that as a result of the adoption of this amendment all of the negro members of the Presbyterian Church have been separated into their own presbyteries and synods apart from the white members; and they aver that the negro members generally belong to separate congregations and that especially in those parts of the United States where there is any objection whatever on the part of white people there are no negro members of white congre-

178 gations of the Presbyterian Church. Defendants deny — aver that in some Cumberland Presbyterian churches negroes were admitted as members and that there was nothing in the law to prohibit the same. Defendants aver that this question, while made the pretense for holding the union up to abhorrence has not in fact become troublesome or objectionable anywhere; and that the Presbyterian Church, while recognizing that the mission of the church is to be an instrument of salvation to people of all races, had dealt and

is dealing with the race question in such a manner as fully harmonizes with the best instincts of the white race. They aver that the fact that a few negro delegates sit in the general assembly is of small consequence and in no way offensive to white people. They aver further that in 1907, the general assembly of the Presbyterian Church, as its highest judical body, interpreted the aforesaid amendment to its constitution to the effect that wherever it might be sought to place the people of any particular race in separate presbyteries or synods, it would not be necessary to obtain the consent of those whom it might be sought to place in said separate synods or presbyteries. Defendants also aver that this whole question is a question of wisdom and judgment and policy with which the properly constituted authorities of either church had a right to deal and did deal in a proper manner and that with their action this court, being a civil court, has no right to interfere.

Defendants deny the averments of the bill to the effect that the proposition submitted by the Cumberland Presbyterian general assembly to the presbyteries was insufficient. They aver that said proposition as has been heretofore shown was taken and had to be taken in connection with the whole basis of union as agreed upon by the committees and adopted by the assembly. They aver that said proposition contained within itself all the elements of an am-ndment which was so far reaching as to abrogate the constitution and confession of faith of the Cumberland Presbyterian Church and substitute therefor the constitution and confession of faith of the Presbyterian Church. They deny that it was necessary that said proposition should recite in so many words the exact and entire language of the changes designed to be made. They aver that this was substantially incorporated into the proposition and that the government of the general assembly in declaring the basis of union to have been duly and lawfully and regularly adopted was final and conclusive upon this question and cannot be inquired into or questioned in this court.

Defendants deny that the general assembly which was organized for the Cumberland Presbyterian Church in 1810, met in
179 Dickson County, Tennessee, in May, 1907, but they aver that said meeting represented another and different body having the same name and having taken the Cumberland Presbyterian confession of faith. They suppose that it is true that it did transact some business, but concerning said business defendants are having nothing to do and they insist that it is not material to any of the matters in question in this cause. They deny that exhibit "C" to the bill is the correct minutes of said meeting or statistical summary. Said summary is in many places padded with claims of membership that have no basis. Defendants have endeavored in part to explain some of the causes of the opposition to the union and they deny that there is any serious disfavor or disapproval of said union among the communicants of the Presbyterian Church. They deny that it was a case of absorption, but aver that it was a proper and dignified and worthy union and reunion of two great religious bodies in order to more effectively carry on the work which they designed to do. They deny that more than two thirds of *of* the former

Cumberland Presbyterian Church are opposed to the union and they aver that the number of the opponents of union is much less than half of those who were members of the Cumberland Presbyterian Church before the union. They deny that many of those acquiescing in the union are doing so because misled by others into the beliefe that they are powerless to do otherwise; but they aver that those who have gone into the union are well satisfied with it and have found conditions to be very different from those which were represented by the opponents of union. Defendants deny that the Presbyterian Church is trying to fight the Cumberland Presbyterian Church or to destroy it or to take its property away from it. They aver that the property rights of the Cumberland Presbyterian church they have well safeguarded in every particular and that the Presbyterian Church has acquired no more right of control over the property which was held by the Cumberland Presbyterian Church than was enjoyed by the Cumberland Presbyterian Church itself. Defendants aver that the relators and all of those whom they represent, by their acts of secession and separation, have incurred a total forfeiture of all right to the use of said property. Defendants aver that it is the purpose of the Presbyterian Church through those of its members who were formerly members of the separate body known as the Cumberland Presbyterian Church, to use said property for purposes entirely consistent with the purpose for which said property was acquired.

Referring again to exhibit "C", respondents state that the said minutes of said general assembly which met at Dickson, Tennessee, in May, 1907, are not the real minutes as made up and filed during the meeting of said assembly, in so far as the same are contained in said printed minutes 1*a* to 84*a*, inclusive, and state that many of the pages of said appendix were prepared long after said assembly had adjourned and that the stated clerk, who was also the publisher of said minutes spent several months after the adjournment of said general assembly in gathering the statistics published in said minutes and made several appeals through the Cumberland Banner, the organ of said church, asking for assistance and stating that the publication of the minutes was delayed because of a lack of information as to the statistics that he desired to print in said minutes.

The list of churches and the value of church property and the number of the members set out in said minutes does not correctly represent the churches, the church property or the church members who refused to abide by the action of their church in going into the union with the Presbyterian Church in the United States of America. In said appendix they have included the names of hundreds of congregations and hundreds of thousands of dollars of church property, and tens of thousands of communicants who went with their church into the reunited church and are loyal to their church vows and to the reunited church.

They say that this appendix is misleading on its face as pretending to represent to the uninitiated the strength of the anti-unionists and it sets out the names of over 2900 churches or congregations

after 1478 of which there is printed an asterisk or star, showing upon their face that they had not received any reports at all from these churches either at the time of the meeting of the assembly or at the time of the printing of the minutes several months after the adjournment thereof, creating the impression upon those reading their minutes that all said churches or congregations were in sympathy with them, while in truth and in fact, many of these churches, if not all of them, had positively refused to make any reports whatsoever to them and were loyal to the reunited church; and many of the 1429 churches or congregations printed without a star are only fractions or portions of the congregations so named and, in many instances, those fractions were only small minorities of the congregations and the congregations themselves are still loyal to the union and are holding regular services as congregations of the reunited churches. Yet in said reports they report the entire valuation of the church property. For instance in Mississippi synod, Oxford synod, there are printed statistics from 22 congregations each of which has a star printed after it showing that they
181 have not been able to secure any report from a single one of them; and in Missouri synod, Kirksville presbytery, there are 27 congregations printed with a star; in Texas synod, Amarillo presbytery, there are 25 congregations printed with a star; in Alabama synod, Robert Donnell presbytery, there are 32 congregations marked with a star; and in Arkansas synod, Arkansas presbytery, there are 53 congregations marked with a star and in no one of said presbyteries is there a single congregation printed without a star. The same is shown to be true by their own printed minutes of many other presbyteries throughout the church. And yet their appendix shows that the statistics printed were taken from the reports of said churches in the year 1906 to the general assembly of the church before the disaffection and that they have *yaken* said statistics and *and* published them to the world for some reason best known to themselves, when the real purpose of the minutes of any church council is to represent the statistics of said church made according to *to* the custom of that church to that council. And in many instances they claim the entire church property of where they have only a f-action of the former membership of the church, as appears from almost every page of the appendix to said minutes, and as will be specifically pointed [illegible] at the hearing.

Respondents also say that along with said printed minutes the stated clerk sent out a red printed card, officially signed by him, to the persons to whom the minutes were sent for distribution, which card was in words as follows:

"General assembly minutes for the clerks of church sessions are sent you for distribution. A minute for each church without a star. Will you see that chur*hces* get them? If others entitled, let me know. "J. L. GOODNIGHT,
Stated Clerk."

which shows that they did not consider the churches with a star as properly belonging to their congregation; and an addition of the

membership reported in said minutes shows that they report 163554 members and they only claim to have had reports to their organization at the time of the printing of the minutes, which was as stated, above, several months after the adjournment of the assembly, 65233, and in this list are included many churches or congregations either by accident or by mistake that do not belong to them at all and the number is so large that no attempt will be made further than to name a single instance, that is, the congregation at Paris, Texas, with more than 600 members, which church is almost unanimously in favor of the union. The number of actual members of this organization is far less than even the aforesaid number.

182 Defendants aver that the case of Ira Landreth et al. v. J. L. Hudgins et al. referred to on page 40 of the bill as now pending in the Supreme Court at Nashville, was instituted at Fayetteville, Tennessee, in order to obtain a judicial determination of the questions of law presented by the opposition to the union and to put at rest at last a systematic campaign of strife which was being maintained in many parts of this State, especially by the opponents of union. They aver that to that bill, filed by the unionists, the opponents of union filed an answer setting forth practically every contention set forth in the bill in this cause and making substantially the same so-called charges of fraud contained in this bill; and that the defendants in that cause did not undertake to prove said cause said charges, because they knew that they could not prove them and the chancellor found that there was no fraud in the conduct and consummation of the union. Defendants admit that under said bill the complainants procured the arrest of certain members of Jackson, Tennessee, upon a charge of contempt in that they had violated an injunction therein granted prohibiting the institution of other lawsuits in Tennessee affecting the questions therein involved; and defendants aver that it was not the intention of the complainants in said cause to punish any one, but simply to show to the court that they were insisting upon all of their rights and endeavoring to maintain consistently the position for which they were contending.

Defendants deny that the said union of the churches is void and of no effect; they deny that the adjournment of the general assembly of the Cumberland Presbyterian Church sine die was null and void and they deny that the relators have been regularly elected by the general assembly of the Cumberland Presbyterian Church, which has the right to elect the members of the board of publication and they deny that the relators are entitled to be placed in their offices as members of said board of publication.

All allegations of the bill which have not heretofore been expressly denied are now generally denied.

And now, having fully answered, defendants pray to be hence dismissed with their reasonable costs.

JOHN H. DE WITT.
PARKS, BELL & MONTGOMERY.
Solicitors for Defendants.

183 The following is exhibit "B" to the plea filed herein, viz:

STATE OF TENNESSEE:

Be it remembered, that at a Supreme Court of Errors and Appeals, begun and held at the Capitol, in the City of Nashville, on the first Monday in December, 1908, it being the seventh day of December, 1908, neither Judge attending, I adjourned Court until to-morrow morning at 9 o'clock.

JOE J. ROACH, *Clerk.*

The Clerk adjourned Court from day to day until Monday, December 14, 1908.

MONDAY, *December* 14, 1908.

Court met, pursuant to adjournment—present, Honorable Associate Justices W. K. McAlister, M. M. Neil, Jno. K. Shields, and B. D. Bell—when the following proceedings were had, to wit:

APRIL 3, 1909.

No. 1, Lincoln. Equity.

IRA LANDRITH et al.
vs.
J. L. HUDGINS et als.

Be it remembered that this cause came on to be heard upon a transcript of the record from the Chancery Court of Lincoln County, assignments of error, brief, reply brief, and argument of counsel, which argument was heard at the last term of this Court; upon consideration whereof, the Court is of opinion that the proceedings taken for the union for the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America were unconstitutional and void and not effective to unite or merge the Cumberland Presbyterian Church and the Presbyterian Church, U. S. A., and that the doctrines, and confession of faith, of the Cumberland Presbyterian Church are not in substantial accord with the doctrines and confession of faith of the Presbyterian Church U. S. A.; that the first subdivision of the plan of union which involved the surrender of the name and organization of the Cumberland Presbyterian Church was not submitted to the Presbyteries, but was left to be determined and was determined by the General Assembly of the Cumberland Presbyterian Church, which action of said Assembly was beyond its powers and void; that the Cumberland Presbyterian Church still remains a vital and independent organization, with a
184 General Assembly, Synods and Presbyteries, and that the defendants are truly identified therewith in doctrine, polity and organic subordination; that the complainants are not so identified, but have united themselves with another and different ecclesiastical organization; that the property involved in this suit, to-wit, the property of the Fayetteville congregation, which many years before the attempted merger for a consideration of six hun-

dred dollars, was conveyed "to the officers of the Cumberland Presbyterian Church and their successors in office for the use and benefit of the Cumberland Presbyterian Church," is vested in the defendant officers of said Fayetteville Church for the use and benefit of the congregation of Fayetteville, which adhered to the Cumberland Presbyterian Church, and the complainants have no interest therein; and the use and occupation of said property by those complainants who have united with the Presbyterian Church U. S. A., is a violation of said trust.

And it further appearing to the Court that the equities of complainants' bill have been fully met and denied by the answer and proof of the defendants, it is therefore ordered, adjudged and decreed, for the reasons set forth in the opinion that their bill be dismissed.

It is further ordered, adjudged and decreed that the injunction heretofore granted in this cause be dissolved, and that the contempt proceedings in the case as to W. E. Dunnaway, and nine others be dismissed, and the cost of the contempt proceedings, and of the injunction, be paid by the complainants and their sureties on the original cost bond.

The Court is further of opinion, and so adjudges and decrees that the Chancery Court of Lincoln County was without jurisdiction over the lands and houses described in the bill situated in Carroll, Davidson and Weakley Counties.

It is further ordered, adjudged and decreed by the Court that the Complainants, Ira Landrith, J. M. Hubbart, B. P. Fullerton, W. A. Provine, G. H. Hogan, Thos. Bagley, J. L. Waggoner, R. B. West,
M. B. Malloy, J. T. Burns, R. J. Parnell, D. A. Burkhalter,
185 J. P. Ridley, W. W. Hamilton, R. H. Brown, W. A. White,
W. F. Collins, J. H. Howell, H. T. Fullerton, C. A. Hudson, E. L. Jones, principals, R. Ed Feeney and R. L. Wallace, sureties, pay the cost of this cause, for which let execution issue.

Office of Clerk of the Supreme Court for the Middle Division of the State of Tennessee.

I, Joe J. Roach, Clerk of said Court, do hereby certify that the foregoing is a true, perfect, and complete copy of the decree of said Court, pronounced at its December Term, 1908, in case of Ira Landrith, et al. v. J. L. Hudgins, et als., as appears of record now on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Court at office, in the Capitol at Nashville, on this, the 26th day of May, 1910.

JOE J. ROACH, *Clerk.*

186 The following bill was filed in the Chancery Court of Lincoln County, Tennessee, at Fayetteville, and is filed as an exhibit to the plea to the jurisdiction in this cause, to-wit:

EXHIBIT C TO PLEA.

IRA LANDRETH et al.
v.
J. L. HUDGINS et al.

To the Hon. Walter S. Bearden, Chancellor of the Fifth Chancery Division of the State of Tennessee, holding the Chancery Court at Fayetteville, Tennessee:

Ira Landreth, a citizen of Davidson County, Tennessee, J. M. Hubbert and B. P. Fullerton, citizens of the State of Missouri, W. A. Provine, a citizen of Maury County, Tennessee, G. H. Hogan, Thomas Bagley, J. L. Waggoner and R. B. West, citizens of Lincoln County, Tennessee, M. B. Molloy, J. T. Burns, R. J. Parnell, D. A. Burkhalter, J. P. Ridley and W. W. Hamilton, citizens of Carroll County, Tennessee, R. H. Brown, W. A. White, W. F. Collins, J. W. Howell, H. T. Fullerton, C. A. Hudson, and E. L. Jones, citizens of Obion County, Tennessee, said Hogan being the pastor and the other citizens of Lincoln County being the elders of what was the Cumberland Presbyterian Church at Fayetteville, Tennessee, and said Molloy being the pastor and the other citizens of Carroll County being the elders in what was the Cumberland Presbyterian Church at McKenzie, Tennessee, and said Brown being the pastor and the other citizens of Obion County being the elders of what was the Cumberland Presbyterian Church at Kenton, Tennessee, all of said pastors and elders and other complainants suing, not only in their own individual capacity, but also in their representative capacity as set forth in this caption and in this bill and all other ministers, officers and members of the Presbyterian Church in the United States of America, they being too numerous to be named herein, complainants, against J. L. Hudgins, P. F. Johnson, C. G. Tighlman, F. P. Campbell, C. R. Wade and W. R. Holmes, citizens of Obion County, Tennessee, T. H. Padgett, a citizen of Shelby County, Tennessee, Hardy Copeland, a citizen of Davidson County, Tennessee, and A. N. Eshman, soon to be a citizen of Davidson County, Tennessee, F. A. Seagle, a citizen of Hamilton County Tennessee, T. A. Havron, a citizen of Marion County, Tennessee, W. M. Robinson, a citizen of Texas, but supposed to be now in Madison County, Tennessee, Allen Foust, J. W. Smith, J. R. Granade, J. O. Dinwiddie and C. E. Large, citizens of carroll County, Tennessee, W. A. Erwin, a citizen of Texas, but supposed now to be in ——, County, Tennessee,, R. P. Moore,
187 G. C. Haynes, and J. W. Smith of Carroll County, who, with complainants Burns and Ridley, are the trustees of McKenzie Church, citizens of Lincoln County, Tennessee, Joseph H. Fussell, a citizen of Maury County, Tennessee; said Tighlman, Campbell, Wade and Holmes, with complainants White, Collins, Howell, Fullerton, Hudson, and Jones are the elders and present trustees holding the legal title of the Kenton property; and all other ministers, officers, and members of the Cumberland Presbyterian Church who

renounce or refuse to recognize the united church known as the Presbyterian Church in the United States of America, they being too numerous to name herein; C. T. Bishop, A. B. Winford, C. J. Farmwalt, renouncing elders and D. M. Goodner, a member of the Fayetteville church, Defendants.

1. Complainants would show unto your honor that in the latter part of the eighteenth century and beginning of the nineteenth century, a part of the territory now comprising Middle Tennessee and Kentucky was called the Cumberland Country. In the beginning of the nineteenth century there developed in this Cumberland country an extraordinary religious awakening which was afterwards known as the revival of 1800. This revival was largely or-ginated and promoted through the Christian activity of a large number of ministers and laymen of the Presbyterian Church, who were afterwards known as the "revival party." The revival movement and especially its methods were opposed by some of the most conservative Presbyterian ministers and laymen of the Cumberland country. They soon became known as the "anti-revival party." There were not enough ministers in this section of country efficiently to carry on the revival work and *and* the emergency did not allow time to educate new ministers according to the Presbyterian standard of education. Devout laymen undertook, in some instances, under these peculiar circumstances, to explain and enforce the teachings of the gospel and their efforts proving successful, Cumberland Presbytery of the Presbyterian Church ordained them to the full work of the ministry.

These young men in their evangelical work naturally made prominent and emphatic the free agency of the individual in accepting the plan of salvation. In this way their attention was specially challenged to the teachings of the Westminster Confession of Faith as to the doctrines of election, foreordination, the eternal decrees and the correlated doctrines. These teachings were expressd in such
188 language as to be capable of a construction that involved the doctrine of fatality. The ordination vows of the church required candidates for ordination to declare that they received and adopted the confession — faith as containing the system of doctrines taught in the holy scriptures. These young men claimed the right to make this declaration with the explanation that they did not understand the confession of faith as teaching the doctrine of fatlity and if it did so teach, they accepted the confession with that doctrine excepted. The anti-revivalists objected to this qualified declaration. They appealed to the synod and the synod undertook to revoke the *the* ordinations. The presbytery denied the constitutional right of the synod to make the revocation and ultimately the synod dissolved the pre-bytery. The controversy continued until the revivalist party became satisfied that they could not, without sacrifice of principle, remain longer in the Presbyterian Church. Accordingly on the fourth day of February, 1810, at the residence of Samuel McAdow, a log cabin in Dickson County, Tennessee, three ministers, Finis Ewing, Samuel King, and Samuel McAdow, or-

ganized an independent presbytery, calling it Cumberland Presbytery and this was the beginning of the Cumberland Presbyterian Church.

Its founders hoped and expected that the presbytery thus formed would in a short time thereafter become reunited with the Presbyterian Church. They deprecated separate denominational existence, avoided it as long as possible, took the step with great reluctance and fondly cherished the hope that the separation would be of short duration. They expressly adopted the Westminster confession of faith and the presbyterian constitution and other doctrinal and ecclesiastical standards. The presbytery ordered that all candidates for licensure and ordination should adopt the confession "except the doctrine of fatality." This order of the presbytery is hereto annexed, marked exhibit "I." This exhibit and all others hereto annexed are made parts of this bill, but need not be copied. The presbytery grew until it was divided into three presbyteries and these presbyteries were in 1813 organized into a synod called Cumberland Synod. The synod in 1829 was divided into three synods and organized into a general assembly. From 1810 to 1813 Cumberland presbytery was the highest judicatory of the church and from 1813 to 1829 Cumberland Synod was its highest judicatory.

2. The best informed and most efficient members of the church, from its organization down to 1903, were convinced that the cause of Christianity would be promoted by the union of all the branches of the Presbyterian family in the United 189 States. The highest judicatories of the church repeatedly participated in negotiations for an organic union with other denominations, notably with the presbyterian church, north, and the presbyterian church, south, and invariably the difference in creeds of the negotiating churches on the subject of predestination proved to be the one impediment in the way of union. Each attempt at a union was abandoned with reluctance and regret. The Presbyterian Church in the United States of America (the Presbyterian Church, North) took action which in 1903, resulted in a revision and construction of its confession of faith and removed all grounds for the contention that it contained doctrines of fatality. The great bulk of the ministry and membership of the Cumberland Presbyterian Church realized that no reason longer existed why the long desired union between these two churches should not take place and the general assemblies of the two churches, which convened in 1903, each appointed a committee to confer with each other on the subject of organic union. The action of the Cumberland Presbyterian assembly is set forth in a paper hereto annexed and made exhibit "II."

The Cumberland Presbyterian general assembly of 1903 exercised the highest degree of deliberation and caution in taking the step which it took. Its moderator retired from the chair, presented a preamble and resolution providing for the appointment of a committee on "Presbyterian Comity, Federation and Union * * * who shall do all in their power to promote the closer federation and organic union of all the branches of the Presbyterian family and

shall consider carefully any proposition that may come before it on this subject." Said paper was referred to the assembly's committee on overtures, consisting of six ministers and eight elders. This committee unanimously reported in favor of the adoption of a resolution appointing a committee of nine, afterwards increased to eleven, to confer with such like committee as might be appointed by other Presbyterian bodies in regard to the "desirability and practicability of closer affiliation and organic union among the members of the Presbyterian family in the United States." The report of the committee is hereto annexed, marked exhibit "II." Very unusual and very precautionary methods were adopted for the selection of this committee in order that it might be truly representative in its character. The general assembly elected as chairman of the committee Rev. W. H. Black, D. D., president of Missouri Valley College, a man of superior ability, scholarship and integrity. The synods of the church were divided into four groups as nearly equal in commissioners as possible and each group, through its commissioners separately assembled, was authorized to elect one
190 minister and one ruling elder as members of the committee. The paper so providing for the selection of the committee is hereto annexed, marked exhibit "III." To the eight thus chosen three more were added to the assembly itself from the church at large, making with the chairman twelve of the church's ablest and most trusted ministers and elders, three of them being lawyers of ability. The members of the committee selected by groups of commissioners as above stated were as follows:

Chosen by the commissioners from the synods of Alabama, Mississippi, and Tennessee: Rev. Ira Landreth of Nashville, Tennessee, and elder E. E. Beard of Lebanon, Tennessee;

Chosen by the commissioners from Texas and Indianola synods: the Rev. S. M. Templeton, Clarksville, Texas, and elder M. B. Templeton, of Waxahachie, Texas;

Chosen by the commissioners from the synods of Arkansas, Missouri, and Kentucky: The Rev. B. P. Fullerton, D. D., St. Louis, Mo., and Judge W. E. Settle, of Frankfort, Ky.;

Chosen by the synods of Illinois, Indiana, Iowa, Kansas, Ohio, Oregon, Pacific and Pennsylvania: the Rev. D. E. Bushnell, D. D., Alton, Ill., and Pres. A. E. Turner, of Waynesboro, Pa.;

The general assembly of the Presbyterian Church in the United States of America, which convened in 1903, appointed a similar committee and the two committees met in the city of St. Louis, Mo., and devoted four days and nights to the consideration of the important questions submitted to them.

They appointed sub-committees which met two months later in the city of Cincinnati, for the arrangement of details and these committees remained in session three days. The final result was that the two committees agreed upon a joint report to be submitted by the separate committees, each to its own general assembly, recommending that a union between the two churches be consummated upon a basis set forth in the report. Said joint report is hereto annexed, marked exhibit "IV."

3. This report, after elaborate argument, was adopted by the general assembly and referred to the presbyteries of the church by the adoption of two resolutions offered by Rev. S. M. Templeton, which are hereto annexed, marked exhibit "V." The vote on said resolutions was 163 in the affirmative and 74 in the negative.

At the time said resolutions were adopted the general assembly of the Presbyterian Church had not acted and as it could not be absolutely known that it would adopt the report the Cumberland
191 Presbyterian assembly directed its moderator and stated clerk to submit the basis of union contained in the report to the presby-eries upon receiving final notification that the Presbyterian assembly had adopted the report.

In order that the presbyteries of the church might be fully informed in regard to the revised confession of faith referred to in the joint report the revised portions were printed in the minutes of 1903 of the general assembly of the Cumberland Presbyterian Church, a copy of which revisionary action is hereto annexed, marked exhibit "V." The unrevised portion having for seventy-three years been part of the creed of the Cumberland Presbyterian Church, was already familiar to its members. A copy of said minutes was sent to every minister, candidate and licentiate in the denomination and to the clerk of every session as well as to the stated clerk of every presbytery and synod. The Presbyterian general assembly of 1904, also adopted by *by* a vote almost unanimous, said joint report and submitted the basis of union therein contained to its presbyteries for their approval or disapproval. It also adopted and submitted to its presbyteries for approval an amendment to the constitution of that church providing for the separation of the races in all of the church courts except the general assembly. A copy of said constitutional amendment is hereto annexed, marked exhibit "VII." The moderator and stated clerk of the Cumberland Presby-erian general assembly, pursuant to the orders of the assembly, addressed to every presbyt-ry a communication submitting the basis of union to them for their action. A copy of said communication I hereto annexed marked exhibit "VIII."

The question as to whether the basis of union should or should not be adopted by the presbyteries was most exhaustively discussed for almost one entire year through the official organ of the Cumberland Presbyterian Church published in Nashville, called the Cumberland Presbyterian in which as much matters was published emi-nating from the opponents of the union as from the advocates of it and in addition the opponents of the union established as their organ a weekly periodical called the Cumberland Banner, which was largely circulated, many thousands of copies being sent out gratuitously. Both the champions and opponents of the measure flooded the church with circular literature and the questions involved were discussed by the presbyteries, synods and from the pulpit and in private conversation. A more universal and exhaustive discussion of any measure is practically impossible. The presbyteries made report to the general assembly through its stated clerk

192 by means of printed blanks furnished to them by him, copy of which is hereto annexed, marked exhibit "IX." The reports were received by the clerk and submitted to the general assembly of 1905, and were referred to a special committee. The committee made a majority and a minority report; both of them, however, concurred in finding that sixty presbyteries had approved the basis of union and fifty-one had disapproved of it, two of the 114 presbyteries taking no final action and one not reporting. Said majority report was adopted and its recommendations concurred in. A copy of the preamble and resolution reported by the committee and adopted by the assembly is hereto annexed, marked exhibit "X." By said resolution it was resolved by the assembly that it "does hereby find and declare that a constitutional majority of the presbyteries of the Cumberland Presbyterian Church have voted approval of the reunion and union of said churches upon the basis set forth in said joint report and does find and declare that said reunion and union has been constitutionally agreed to by the Cumberland Presbyterian Church and that the basis of union has, for the purposes of the union, been constitutionally adopted.

4. The general assembly of the two churches continued their respective committees on organic union, the Cumberland Presbyterian Assembly adding to its committee nine additional members, thereby increasing it to twenty-one. Eight of these new memberships were filled by persons who had up to this time opposed the union.

The Cumberland Presbyterian committee so enlarged and continued was directed to confer with the various boards, committees, organizations, and institutions of the Cumberland Presbyterian Church, "with reference to the adjusting of the details of union with the Presbyterian Church in the United States of America." This enlarged committee consisted of the following persons: W. H. Black, Chairman; J. A. McDonald; E. E. Beard; J. H. Miller; R. W. Binkley; R. G. Mitchell; R. L. Phelps; W. P. Bone; W. E. Settle; D. E. Buchnell; W. M. Crawford; R. M. Tinnon; M. B. Templeton; W. J. Darby; B. P. Fullerton; S. M. Templeton; A. E. Turner; John M. Gaut; Joseph E. Jones; T. W. Kellar; J. M. Hubbell, Secretary; Ira Landreth.

After two meetings the committees unanimously, excepting one Cumberland Presbyterian member, adopted a joint report, a copy of which is hereto annexed, marked exhibit "XI."

Each one of the two committees incorporated the joint report in a separate report to its assembly. The Presbyterian Assembly convened on the 17th day of May, 1906, at Des Moines, Iowa, and the Cumberland Presbyterian assembly conveyed on the same day in the city of Decatur, Illinois.

193 On the 16th day of May, 1906, an injunction bill was presented to the honorable W. C. Johns, judge of the circuit court of Macon County, Illinois, of which county Decatur is the county seat, seeking to enjoin the union committee of the Cumberland Presbyterian Church from presenting its report to the general assembly and seeking to enjoin the assembly from acting on such report. The defendants demurred to the bill. It was agreed

between counsel that the report should not be reported or acted on pending the application for an injunction. The injunction was refused and the bill dismissed on the 23d day of May, 1906, and from this action of the court the complainants appealed. Thereupon said committee presented its report and the same was acted on by the adoption of the following resolution:

"Resolved, That the foregoing report of the committee on fraternity and union be accepted and that the joint report on union and reunion contained in said report be adopted."

The vote upon said resolution was 165 in the affirmative and 91 in the negative. The Presbyterian assembly at Des Moines, was informed by telegram of this action and that assembly adopted said joint report and by telegram informed the Cumberland Presbyterian general assembly of the fact and of the further fact that the Presbyterian assembly had made the declaration provided for in section 14 of said joint report. Thereupon the moderator of the Cumberland Presbyterian assembly made the declaration that the basis of reunion was in full force and effect. A copy of said resolution is hereto annexed, marked exhibit "XII." After the final calling of the roll, the assembly adjourned by the adoption of the resolution hereto annexed, marked exhibit "XIII." Thereupon the moderator declared the assembly adjourned sine die as a separate assembly, to meet as part of the general assembly of the reunited church on the third Thursday in May, 1907, at 11 o'clock a. m., at the place chosen or to be chosen by the Presbyterian assembly.

The general assembly of the Presbyterian Church was invested by its constitution with legislative, executive and judicial authority; with power to decide all questions of law, doctrine or ecclesiastical polity coming before it in judicial cases or other controversies or propounded to it as abstract questions or arising in the exercise of its reviewing or superintending power over the whole church. Copies of sections of the constitution and confession of faith conferring such powers are hereto annexed, marked exhibit "XIV." The general assembly of 1903, by the adoption of report No. 1 of its committee on overtures, made exhibit No. 2 to this bill and
194 by adopting the joint report of 1904 and by its action in 1905, set forth in exhibit No. 10, and by adopting the joint report of 1906, clearly adjudged, impliedly and expressly, that the reunion had been constitutionally agreed to by the Cumberland Presbyterian Church and that the basis of union had been constitutionally adopted. By adopting the joint reports of 1905 and 1906, it decided that there existed substantial identity between the two creeds and this decision was concurred in by the presbyteries of both churches and the assembly of the Presbyterian Church. All the members of the Cumberland Presbyterian Church had impliedly and expressly promised when they became such members to abide by and support the rules and regulations of the church and submit to its constituted authorities so long as they continued members. The express promise is found in section 21, subsection 4, of the Directory for Worship, a copy of which is hereto annexed, marked exhibit "XV." All the members of the church, both ministers and

laymen, were therefore under legal and moral obligations to acquiesce in the action of the general assembly and presbyteries in entering into the church union. This obligation was strengthened by the decision of Judge Johns. The bill before him was filed by Joe H. Fussell, a citizen of Tennessee, and four other citizens of this state, A. N. Eshman and J. J. McClelland, of the State of Mississippi, Thompson Ashburn and two others of the State of Indiana, and fourteen citizens of the State of Illinois, all alleged to have been members of the Cumberland Presbyterian Church. It was filed in their own -half and in behalf of all other members of said Church who were opposed to the union, alleged to number more than one hundred thousand and alleged to be too numerous to be named individually as complainants to the bill. It was insisted in the bill that the general assembly and presbyteries of the church had no power to enter into the union agreement and that the agreement was null and void. It was further insisted that the creeds of the two churches were radically different and therefore that to carry over the property of the Cumberland Presbyterian Church into the united church would be to commit a breach of trust. It was further alleged that although the adoption of the joint report of 1906 would give no validity, yet that its adoption would cast a cloud upon the title to 2,922 houses of worship owned by the Cumberland Presbyterian Church in the various states of the union; upon its publishing house and equipments located at Nashville, Tennessee; its home for disabled ministers and widows and orphans of deceased ministers, located at Evansville, Indiana; and upon its other general property; that a multiplicity of lawsuits would be occasioned by such
195 cloud and the work of the church greatly embarrassed by the contentions and confusion resulting from the supposed union. Complainants had made defendants to their bill, or attempted to make defendants, J. B. Hail, the retiring moderator of the assembly, and every commissioner, whether principal or alternate, elected by the various presbyteries to the general assembly of 1906; and it also attempted to make defendants every member of the committee on union.

Quotations from said bill sufficient to show its general character, are hereto annexed, marked exhibit "ZXI." The bill had been filed in a court of their own choosing and had been dismissed upon its own averments. Judge Johns delivered an elaborate written opinion which will be filed, if necessary, during the progress of this cause. He held that the general assembly, the highest court of the church, had jurisdiction to decide all questions arising in the construction of the organic law of the church and all questions of doctrine; that the assembly had decided that the union had been constitutionally agreed to and had further decided that there was substantial identity between the two creeds. He further held *held* that these decisions were binding upon every member of the church and upon the civil courts. His decision should at least have been treated by the complainants in the bill as prima facie correct. The general assembly had for seventy-seven years been settling all questions of ecclesiastical law and doctrine and had filled a volume of digest with

its deliverances. That it has such jurisdiction is shown by exhibit No. 14 to this bill. That it has decided correctly in the present instance is perfectly manifest. Complainants are advised and believe that the assembly and the presbyteries would have had the implied power to form the uni-n had not the constitution expressly granted it, but they are advised and believe that the constitution does expressly grant powers which amount to the power to form the union. Moreover, they are advised and believe that the sovereign power of the church was vested in the general assembly and the presbyteries. The assembly and presbyteries made the confession of faith, constitution and other ecclesiastical standards. Never in the entire history of the denomination have the people undertaken to make or amend any of these standards, except through their representatives in these courts. The me-bership of the church incldes men, women and children—some children not exceeding six to eight years of age. As shown by exhibit No. 15, persons joining the church are not expected to or required to avow their belief in the confession of faith. The result is they naturally are not versed in creeds or constitutional questions as are the ministry and elders, who are
196 required in their ordination to avow such belief and whose official duty requires them to pass upon constitutional and creedal questions in the courts of the church.

The vows of these ministers and elders are shown in exhibits Nos. "XVII and XVIII," hereto annexed. Complainants are therefore advised and believe that the general assembly and presbyteries, in the exercise of the sovereign power, may repeal or change the organic law, either by express action or im,iedly, by doing a sovereign act inco-sistent with the constitution.

For about one hundred and fifty years the presbyterian conventions have been construed as granting, or not withholding, the power to form such unions. Instances in which such power has been exercised or asserted are set forth in exhibit No. "XIX," hereto annexed.

Complainants are therefore advised and believe that the decisions of the assembly in question were and are correct, but whether correct or not, they are binding upon every church member and cannot be reviewed by the civil courts and complainants rely on such decisions as conclusive.

6. Notwithstanding these obligations resting upon the opponents of union to abide by the action of the church's constituted authorities and respect the opinion of a civil court to which they had voluntarily submitted the questions involved, a number of them, said to be about ninety, who had been members of the general assembly of 1906, who answered to the final roll call in that body, and remained in it until its final adjournment, assembled in the hall of the Grand Army of the Republic, in the city of Decatur, Illinois, an hour or two after the adjournment of the general assembly and undertook to assume that they, a minority of the commissioners, constituted the general assembly of the Cumberland Presbyterian Church assumed to continue its sittings though it had adjourned until May 7, 1907; assumed that the offices of the assembly had become vacant and proceeded to elect the defendant, J. L. Hudgins, moderator and the

defendant, T. H. Padgett, stated clerk. They undertook to rescind the action adopting the joint report of 1906. They assumed further that all the offices of all the boards and permanent committees of the church had become vacant and proceeded to fill such supposed vacancies by the appointment of new members and officers, ignoring the requirements of the charters of the boards as to filling vacancies. They assumed that all of the houses of worship of the denomination had passed under their control, as well as the publishing house and other general property of the church; they assumed that all who refused — recognize their authority as the gen-
197 eral assembly of the church were revolutionists and seceders; and that all ministers, officers, members, synods, presbyteries and congregations who recognized their authority constituted an organic continuation of the Presbyterian Church and undertook to appropriate and use the name of the church in order more effectually to palm off upon uninformed people this false and deceptive contention. They undertook to adjourn the assembly of the church to meet on the third Thursday in May, 1907, in Dickson County, Tennessee, on the ground where the church was organized in 1910, although the land is owned by the united church. They assumed to own and to have the right to manufacture and sell the confession of faith of the Cumberland Presbyterian Church, although the unexpired copyright to it passed by operation of law to the united church when the union was consummated. Under the organic law of the Cumberland Presbyterian Church the presbyteries were authorized to elect commissioners to attend only one session of the general assembly. This law made no provision for a called session of the assembly except where it failed to meet upon its own adjournment. When the assembly of 1906 adjourned on the 24th day of May, 1906, the term of office of every commissioner expired. There ceased to be any commissioners to sit in a general assembly; no one had power to call a meeting of the assembly and the ex-commissioners could not, even by unanimous vote, have set aside the adjourning order. No attempt was ever made to set it aside, nor was any attempt made to call a meeting of the body. The minority of ex-commissioners who assembled in the Grand Army hall, as above stated, was but a voluntary assemblage of ministers and elders, with no authority whatever to represent any presbyteries or in any way whatever bind the church. In assembling they were actuated by a common purpose and combined and conspired to accomplish that purpose. Their purpose was to repudiate the action of the general assembly and presbyteries in entering into the union agreement and adopting the basis of union and to renounce the reunited church which resulted from the union. The further purpose was to make the people of the church believe that that assembly was in law and in fact, a continuation of the general assembly of the church and that all synods, presbyteries, sessions, boards of deacons, and congregations, and that all who recognized the general assembly of the united church would be mere revolutionists and seceders and would forfeit all property rights and other rights as judicatories, ministers, officers, or members of the church. They undertook to lay plans

and create agencies to induce, by argument, persuasion and other means, which will hereafter be referred to, as many as pos-
198 sible of the ministry and membership to accept as true their representations, renounce the united church and become associates and co-workers in the combination. They appointed a legal committee, of which Joe H. Fussell was made chairman for the purpose of advising the people as to the principles of law involved. Mr. Fussell had assumed to be their legal adviser for a year or more previously and had been made chairman of a committee to conduct the opposition to the union. A large number of the opponents of union had been accustomed to look to him for such legal advice and he had, moreover, presided over nearly all, if not all, of their conventions and causes, and, in fact, was the leader of the opposition. This legal committee has sent forth throughout the length and breadth of the denomination a printed circular declaring the law to be in accordance with the assumptions of the Grand Army hall convention as hereinbefore set forth. The committee declares, in substance and effect, that any part of a congregation, no matter how small, the minority and regardless of the attitude of the session, which adheres to the Grand Army convention, have the right to declare vacant the office of every elder or deason who is loyal to the reunited church and fill his place with a renouncer; that even a mi*mo*rity of a session who renounce the reunited church have a right to declare vacant the pastorate of their church, provided such pastor is loyal to the united church and fill, his place with a renouncing minister; that the members of a presbytery loyal to the grand army convention have a right to exclude from membership in the presbytery and participation in its proceedings even a majority of the members who are loyal to the united church; that such renouncing sessions have the power to take exclusive possession and control of the houses of worship and hold them for services conducted by renouncing ministers, excluding all others, if they saw fit to do so.

Said convention also appointed an advisory board of which A. N. Eshman was made chairman, for the purpose of giving advice to ministers and members of the church as to their duties and otherwise carry out the purposes of the convention. Said Eshman issued and circulated throughout the church a printed circular urging the opponents of union to hasten the division of the church as much as possible, lining up the renouncers against the loyal members, organizing the former where they were in the minority and failed to include the officers of judicatories, urging them to get rid of loyal pastors, declaring that it was better to have no pastor than one who was loyal to the united church and urging them to contend for all, their property rights as declared by the legal committee. Under
199 the authority of the convention, travelling superintendents, or canvassers, were appointed and compensated for travelling about over the State of Tennessee or in certain presbyteries, for the purpose of increasing dissatisfaction with the union, augmenting the ranks of the renouncers, hastening divisions and change of pastors and instigating contentions over church property. To the bill filed at Decatur, Illinois, by the opponents of union, there was

exhibite- a paper purporting to set forth the present creed of the united church. This paper consisted exclusively of quotations from the old Westm-ster confession of faith, without a single word taken from the revisionary action of 1903. A copy of said exhibit is hereto annexed, marked exhibit No. "XX." The opponents of union have recently filed a bill at Atlanta, Georgia, and exhibited thereto a paper similar to it, if not a verbatim copy of the one filed at Decatur. Throughout the length and breadth of the church the employed and voluntary c-ampions of the renunciation are telling the people in public addresses, in private conversations and published statements that no change whatever has been made in the creed of the church and in support of this contention read from or quote- from the old confession without a word of the revisionary action. It has always been the boast of the Cumberland Presbyterian Church that it was not sectional. It had religion enough to pass through the storms of civil war and the perils of reconstruction without a division and has ever studiously labored and with marked success, to suppress sectional feeling. Nevertheless these champions of the renunciation have made thousands of people believe that this was not a mutual union of two denominations but a disorganization of the Cumberland Presbyterian Church and absorption of it by the Presbyterian Church and they have told these people that the union people were going to take from them all their church property and give it to a "northern church," or a "Yankee church," and that the united church would force upon them an admixture of negroes and white people in all the congregations of the south and in all of the judicatories of the church and even force upon them social equality between the races. These statements are made in the face of the amendment to the Presbyterian constitution providing for separation of the races wherever either race desires it. One Hardy Copeland, a Cumberland Presbyterian minister who resided in Texas, was employed to canvas- in Tennessee in the interest of the schism and for weeks besieg*n*ed the congregations in Nashville, seeking to stir up divisions and dissensions. He not only made the deceptive statement referred to above but told the people even in public addresses that the presbyterians in their confession of faith claimed that every preacher had the power to forgive sins in the same manner that such power is claimed for the Pope of Rome. To support this monstrous contention he read a section of the confession of faith of the united church which stood word for word in the Cumberland Presb*u*terian confession of faith from 1810 to 1883 and which had attached to it a foot note explaining that this section meant nothing more than that the visible church had the power to receive persons into its membership and exclude them therefrom, a construction of the passage which had been established and recognized for centuries. It was not surprising therefore that these misrepresentations and appeals to prejudice should have precipitated divisions and organized strife to the great detriment of the church and to the discredit of Christianity. Presbyteries and sessions have been called together by the renouncers for the express purpose of precipitating a lining up between those who adhered to and recognized

the grand army convention as the general assembly of the church and those who recognized the united church. Relations between pastors have been broken up, the collections of the churches are being claimed by antagonistic boards, causing thousands of people to abstain from contributing at all. The funds collected and paid over to the agencies of the convention it is believed are being used to pay the salaries and travelling expenses of their canvassers hereinbefore referred to, although they were contributed for the cause of home missions, foreign missions or some other religious purpose. The Cumberland Presbyterian Church, prior to the union, established a number of missions in Japan, China and Mexico, employing missionaries to conduct the same, and paying the expenses of the missions. It also established a large number of missions in the United States, which it was in like manner sustaining. It was engaged in the publication of a large number of periodicals and books for the maintenance of which it was largely dependent upon the patronage of the members of the church. It raised money to be loaned to weak congregations for the erection of houses of worship, to maintain its candidates for the ministry while they were educating themselves and for maintaining superannuated ministers and the widows and orphans of deceased ministers. To maintain all this missionary and charitable work the church was, and the united church is, dependent upon the voluntary contributions of the membership of the church and to maintain the publishing work is dependent upon their patronage or voluntary contributions. All of this ecclesiastical work, which has cost and still costs, hundreds of thousand of dollars, is still being carried on by the united church. By the use of
201 the name Cumberland Presbyterian and representation of the renouncers that they are the continuation of the old church, thousands of members have been drawn away from the united church and large amounts of contributions of money and large numbers of patrons of periodicals have been diverted and are now being diverted from the Cumberland Presbyterian department of the united church work and turned into the hands of the renouncers.

A multiplicity of law suits over houses of worship, funds in presbyterial treasuries, record books, endowment funds, parsonages and other church property are absolutely unavoidable and imminent. The legal committee appointed by the Decatur convention was authorized and directed to provide for this litigation, the convention foreseeing that the carrying out of their plan would inevitably bring it about. Proceedings more discreditable than litigation are already taking place. At Fayetteville, Tennessee, the adherents of the convention belonging to the Cumberland Presbyterian congregation at that place, in the afternoon of Sunday, July 15, 1906, assembled in the courthouse and assuming that the offices of all loyal elders (there in number out of four elders) had become vacant proceeded to elect three renouncers in their places. The same course was taken as to deacons. These three newly elected and ordained elders, together with the only old elder who renounced the union, came into the church Monday night where the Rev. G. H. Hogan, pastor of the church and moderator of the session, with the three

loyal elders, was holding a session meeting. These four renouncers assumed to be the session of the church and demanded possession of the house and keys. This being refused, they proceeded to fasten all the windows, lock all of the doors, retain the keys and two or three of their number and also three members of the loyal session, remained all night, thus inaugurating a contest of endurance for the possession of the property. The renouncing elders left sometime before nine o'clock on Tuesday morning without any explanation of their purpose. On Saturday, July 21, some person in the interest of the renouncing session, entered the building, as complainants are informed and believe, by force, fastened the windows, locked or barred the doors, and *have* excluded the pastor and loyal elders and congregation from the house of worship. At Bowen's Chappel, in Humphreys County, Tennessee, one of the minority, or renouncing, elders, surreptitiously got possession of the key of the house of worship, barred and locked the doors and windows and when the pastor came on Sunday to hold service a large crowd was present unable to gain admission. On invitation, the pastor and his auditors
202 repaired to a neighboring church where the service was held. Public indignation caused a surrender of the keys, but how soon and in what way the contest will be renewed can only be conjectured. Similar steps have been taken at McKenzie, Tennessee, and similar troubles have arisen at Dyer and other places. At both places the possession of the house of worship has been wrested from the possession of the complainants, the elders loyal to the united church.

At Kenton, Tennessee, the pastor of the church went to the house of worship at 10:30 o'clock a. m. on Sunday for the purpose of holding the 11 o'clock service and found defendant R. F. Johnson, a renouncing minister sitting in his pulpit. The latter arose and declared that since the pastor was a Presbyterian preacher he had no right to preach in that pulpit and declared that he himself would conduct the service. The performance having been previously advertised a large and morbid crowd was present to witness it. The pastor with his hearers retreated to *to* the Methodist church, where their worship, was conducted. This statement as to what took place is made upon information considered by complainants to be reliable and they believe it to be true. These are but samples of what is taking place and will continue to take place unless prevented by the injunctive power of this court. It is evident also that a large number of suits will be originated in the State of Tennessee within the next few weeks involving contests over church property. Because of the present inability of the contending forces to settle their disputes it is to the interest of both parties and the entire people of the State that they be settled by some judicial tribunal as speedily as possible. The defendants in their bill filed at Decatur, Illinois, insisted that the adoption of the joint report would cast a cloud upon the title to 2,922 houses of worship and upon parsonage and endowment funds held by various congregations in the church and upon the publishing house, Thorton's Home, certain institutions of learning and other property belonging to the denomination. Com-

plainants are advised and believe that the adoption of the union reports vested the title to all the church property in the united church. They are further informed and believe that *that* the contention on the part of the defendants that the union agreement is a nullity casts a cloud on the title to such property to the extent that credence is given to such contention. Complainants therefore agree with defendants that there is a cloud on the title which a court of equity can and should remove. Defendants also insisted in said bill that the adoption of said report would give rise to a multiplicity of lawsuits which a court of equity could and should prevent
203 by injunction. Agreeing with them, complainants admit that the adoption of said report is giving rise and will continue to give rise to numerous suits, which should be prevented. These suits, depending for their determination, as they must, upon legal questions arising upon the construction of printed documents, must necessarily involve*d* the same questions of law and facts. Complainants have endeavored to exhibit to this bill a copy of every document believed to be material to any question involved in the controversies. If they have failed to exhibit any document that is material they stand ready to do so. They are thus endeavoring to facilitate a speedy hearing of this cause upon demurrer if possible.

Complainants are further advised that and believe that the decisions of the highest ecclesiastical court of the church, held to be correct and conclusive by a civil court of defendant's own choosing and upon the allegations of their own bill, should be treated as at least prima facie correct for the purposes of preliminary injunction and that the status called for by those decisions should be faithfully preserved until the final decision of this cause.

It would be*p* practically impossible to describe every piece of real estate and other property involved in these controversies and complainants are informed and believe that it is not necessary; nevertheless, they he*re*to annexed, marked exhibit "XXI *a*, *b*, *c*, and *d*," copies of the deeds under which are held the houses of worship at Fayetteville, McKenzie and Kenton, and the publishing house at Nashville.

Complainant Ira Landreth is the moderator of the Cumberland Presbyterian Church general assembly which convened in 1906, and as such will officiate in the general assembly of the united church in 1907. Complainant J. M. Hubbert is in like manner the stated clerk of the Cumberland Presbyterian assembly and is assisting in the discharge of the duties of stated clerk of the united assembly. Complainant W. A. Provine is the president of the board of publication of the Cumberland Presbyterian Church, a corporation existing under the laws of Tennessee and having its place of business at Nashville, Tennessee, and whose charter is found in the Acts of the State of Tennessee, 1859-60, page 518, P. Dig. 460. Complainant B. P. Fullerton is the president of the board of missions and church erection*n* of the Cumberland Presbyterian Church, a corporation existing under the laws of the State of Missouri and having its place of business in St. Louis. Said Landreth and said Hubbert are also, respectively, the chairman and the secretary of the committee

on pastoral oversight appointed by the assembly of 1906 and
204 which was "authorized, from time to time as occasion may require, to employ such legal counsel as in its judgment may be necessary properly to defend or prosecute any litigation which may arise in any part of the church during the ensuing year and to concert such other measures as it may deem necessary to promote the interests of the church.

Complainants Thomas Bagley, J. L. Waggoner and R. B. West are the three of the four elders of the Cumberland Presbyterian church at Fayetteville, Tennessee, now of the Presbyterian Church in the United States of America, who are loyal to the united church and recognize the same; and complainant G. H. Hogan is the pastor of that church and recognizes the union. The pastor and the elders of the church at McKenzie, Tennessee, who adhere to the united church are complainants M. B. Molloy (pastor) and J. T. Burns, R. J. Parnell, D. A. Burkhalter, J. T. Ridley and W. W. Hamilton, (ruling elder). The renouncing elders of said congregation are J. W. Smith, J. R. Grenade, J. O. Dinwiddie, and C. E. Larde. The pastor and elders of the congregation at Kenton, Tennessee, who recognize the united church, are complainants R. H. Brown (pastor), W. A. White, W. F. Collins, J. W. Howell, H. T. Fullerton, C. A. Hudson, and E. L. Jones.

Defendant J. L. Hudgins, as before stated, was elected moderator of the pretended general assembly of the Cumberland Presbyterian Church, held in the Grand Army hall at Decatur, Illinois. Defendant T. H. Padgett was elected its stated clerk. A. N. Eshman was appointed by said convention chairman of its advisory board and defendant F. A. Seagle, president of its board of publication. T. A. Havron is the editor of the organ of the renouncers and one of their leaders. W. M. Robinson, a citizen of the State of Texas, is one of the paid canvassers now working in Tennessee in the interest of the renunciation. Defendants Allen Foust and P. F. Johnson and W. A. Erwin are active and prominent champions and promoters of the renunciation in the state. Defendants claim to be elders of the church at Fayetteville, who renounce the united church and who created the disturbance in that church heretofore set forth in this bill. Defendants C. F. Tighlman, E. P. Campbell, C. R. Wade and W. R. Holmes are the renouncing elders of the church at Kenton, Tennessee. Title to the house of worship of the Cumberland Presbyterian Church, said to number over 2900 and to the parsonages, are with few exceptions held by trustees. The property of the boards and institutions of learning are held by themselves as corporations. The trust declared in deeds for churches and parsonages
are generally in substance that the property is to be held as
205 a house of worship (or manse) for the named congregation "of the Cumberland Presbyterian Church." The present trustees under the deed for the Fayetteville property are —— ——; those for the McKenzie property are —— ——; and those for the Kenton property are the Kenton elders named in the caption of this bill. Complainants are advised and believe that said union has been legally consummated; and that as a result of such

union whatever title, legal or equitable, to any property, or right to control, possess or use the same was possessed by any of the members, judicatories or other ecclesiastical agencies of the Cumberland Presbyterian Church, passed by operation of law to the members or corresponding judicatory or agency of the united church. They are further advised and believe that all the members, including ministers, of the Cumberland Presbyterian Church who renounce the united church cease to be members of said church and that said renouncing ministers vacate their positions as pastors and members of presbyteries and synods and that all such renouncing officers, members of boards, of committees, or persons in other ecclesiastical positions, vacate their respective offices or positions and that all such ministers, officers and members relinquish all their rights in, or in relation to, all church property. Complainants are further advised and believe that they have a right to file this bill in order that all doubt may be removed as to the effect of the action of said two churches in forming said union upon said church property and to quiet the possession of those ecclesiastical authorities who are lawfully in possession of such property and to restore possession to those who have been unlawfully dispossessed.

The Presbyterian Church in the United States of America is an unincorporated voluntary religious society, as was also the Cumberland Presbyterian Church. Both of said denominations existed under the presbyterian form of government, having a gradation of church courts consisting of the session, presbytery, synod and general assembly, each having certain control of the others in the order named, the general assembly being the highest court. The constitutions of said churches and their doctrinal and other ecclesiastical standards, all of which exist in printed book form, are too voluminous to be copied, but are made exhibits to this bill, marked A and B. Complainants were all members and communicants in the Cumberland Presbyterian Church and as the result of the union are now communicants in the united church, the Presbyterian Church
206 in the United States of America. The membership of the Cumberland Presbyterian Church who adhere to the united church are believed to number largely more than one hundred thousand and the membership of the united church is more than one million. Said membership is scattered over a number of states and is continually changing by accessions, dismissions and deaths. The membership of either or both churches is too numerous to made complainants by name and for other reasons mentioned it is impracticable to do so. Complainants therefore pray to be permitted to file this bill in their own behalf and in behalf of all the members of the Presbyterian Church in the United States of America and especially in behalf of those members of said church who formerly belonged to the Cumberland Presbyterian Church and who now adhere to the united church.

The members of the Cumberland Presbyterian Church who antagonize the union and have renounced the united church number many thousands and are likewise scattered through a number of states and are fluctuating by changes from one presbytery to an-

other and it is therefore impossible to make them defendants by name. Those who are named as defendants to the bill are eminently representative in their character, official position and relation to the renunciation movement and to those engaged in it and associated with it.

Complainants therefore pray that all of the ministers, officers, members, boards, committees, employees and agents of every character and description who are or claim to be part of the so-called Cumberland Presbyterian Church be made defendants to this bill and be represented by the named defendants herein enumerated and that said named defendants be authorized and required to defend for themselves and their unnamed co-defendants.

7. The premises considered complainants pray that the defendants named in the caption of the bill be made such by the service of process and by publication, if necessary, the process returnable to the earliest practicable rule day; that they be required to make defense to this bill, but that if they answer the same the answer shall not be upon oath, the oath being expressly waived; that on final hearing decree be rendered declaring that said union between the churches was legally formed and is valid; that all of the property rights possessed by the Cumberland Presbyterian Church or any of its judicatories or congregations passed by operation of law as a result of the union with said judicatories or congregations into the united church; that all ministers, officers and members belonging to what was the Cumberland Presbyterian Church and ad-
207 hering to the Presbyterian Church in the United States of America constitute the true and lawful members of the various congregations, sessions, boards of deacons of the various congregations, and that all who renounce or shall renounce said united church have ceased, or will cease, to be members of the congregations, sessions, boards of deacons, presbyteries, or synods which formerly constituted the congregations, boards of deacons, presbyteries or synods of the Cumberland Presbyterian Church; that all elders and deacons so renouncing the united church have or will cease to be elders or deacons in said congregations and cease to have any right to control or hold possession of any property belonging or appertaining to their respective congregations; that all pastors of churches so renouncing the united church have or will vacate their respective pastorates; and that all such renunciators will forfeit all their rights of property and all other rights and privileges as members, officers or ministers in said judicatories. Complainants especially pray that the elders loyal to the united church at Fayetteville, McKenzie, and Kenton be placed in possession of the church property at said places, their rights be declared and their possession protected.

Complainants pray that your honour will grant a preliminary injunction, enjoining all ministers, officers and members of the Cumberland Presbyterian Church who repudiate and renounce the action of the general assembly and presbyteries of said churches in agreeing to and forming a union with the Presbyterian Church in the United States of America, or who renounce the united church resulting from said union, known as the Presbyterian Church in

the United States of America, together with all their associates, confederates, agents, and representatives and that said persons be enjoined from doing the following things, viz:

1. From interfering with or molesting the pastors, elders, deacons, church members or other ecclesiastical agencies who adhere to and recognize said united church, in the use, enjoyment, possession and exclusive control of all houses of worship, parsonages, endowment funds or other property or effects which belonged to the Cumberland Presbyterian Church or any of its boards, committees, judicatories, congregations or institutions or are held in trust for them.

2. From instituting or prosecuting any suit at law or in equity for the purpose of asserting any right which they, or any of them, may claim to have, possess, control or use any of said property.

3. From using the name of the Cumberland Presbyterian Church as the name or any part of the name of any of their organi-
208 zations, congregations, sessions, presbyteries, synods, general assemblies, boards, committees, or other ecclesiastical judicatories, institutions or agencies, in connection with the claim, on the part of said judicatory, organization or agency, or any one acting for it, that it is a judicatory, organization or agency of the original Cumberland Presbyterian Church as organized in 1810.

4. From manufacturing or selling the confession of faith of the Cumberland Presbyterian Church or any other of its copyrighted books, pamphlets or publications.

5. Complainants pray that writs of injunction be issued and as far as practicable served upon the defendants named herein and that, in addition thereto the injunction herein granted be published in such newspapers throughout the State as may be designated by complainants or the court and that further publicity be given it by the distribution of printed copies thereof.

6. Complainants further pray that should this injunctive order be disobeyed by any of the parties herein enjoined, attachments issue against them and that they be dealt with according to law.

7. Complainants further pray that upon final hearing the injunction herein prayed be made perpetual.

Complainants pray for all such other and further relief as is suited to this cause.

This is the first application for the injunction herein prayed for.

JOHN M. GAUT AND
M. W. WOODARD,
Solicitors for Complainants.

STATE OF TENNESSEE,
County of Davidson, ss:

Before me, John H. De Witt, a notary public in and for said county this day personally appeared Ira Landreth and G. H. Hogan, complainants in the foregoing bill and made oath in due form of law that the facts stated in said bill as of their knowledge are true and those stated as upon information and belief they believe to be true.

IRA LANDRETH.
G. H. HOGAN.

Sworn to and subscribed before me, this the 20th day of July, 1906.

[SEAL.] JOHN H. DE WITT,
Notary Public.

To the clerk and master of the Chancery Court at Fayetteville, Tennessee:

Upon complainants executing bond in the sum of five hundred dollars conditioned as required by law, you will issue the writs of injunction as prayed for in complainants' bill.

JNO. W. CHILDRESS,
Judge Tenth Judicial Circuit.

July 21, 1906.

209 The following exhibit "D" to the plea to the jurisdiction was filed, viz:

IRA LANDRIETH et al.
v.
J. L. HUDGINS et al.

The joint and separate answer of J. L. Hudgins, A. N. Eshman, J. H. Fussell, T. A. Havron, F. A. Seagle, and Hardy Copeland to the bill filed against them and others by Ira Landrith and others in the Chancery Court at Fayetteville, Tennessee, on the 21st day of July, 1906.

These respondents, saving and reserving to themselves the benefit of all proper exceptions and objections to the said bill on account of errors and insufficiencies therein and especially on account of misjoinder of parties, both complainant and defendant, for answer to so much and such parts thereof as they are advised it is material for them to answer, say:

The Cumberland Presbyterian Church was organized in Dickson County, Tennessee, February 4th, A. D. 1810. It was an outgrowth of the great revival of 1800, one of the most powerful revivals that this country has ever witnessed. The founders of the church were Finis Ewing, Samuel King and Samuel McAdow. They were ministers in the Presbyterian Church who rejected the doctrine of election and reprobation as taught in the Westminster Confession of Faith.

The Cumberland Presbytery, which was constituted at the time of the organization of the church and which originally consisted of only three ministers, was in three years sufficiently large to form three presbyteries. These presbyteries, in October, A. D. 1813, met at Beech Church in Sumner County, Tennessee, and constituted a synod. This synod at once formulated and published a "Brief Statement," setting forth the points wherein Cumberland Presbyterians dissented from the Westminster Confession of Faith. They were as follows:

1. That there *is* no eternal reprobates;

2. That Christ died not for a part only but for all mankind;
3. That all infants dying in infancy are saved through Christ and the sanctification of the spirit;
4. That the spirit of God operates on the world, or as co-extensively as Christ has made atonement, in such manner as to leave all men inexcus-ble.

At this same meeting of the synod, too, a committee was appointed to prepare a Confession of Faith. The next year, A. D. 1814, at Suggs' Creek Church, Wilson County, Tennessee the report of the committee was presented to the synod and the revision of the Westminster Confession of Faith which they presented was unanimously adopted as the Confession of Faith of the Cumberland Presbyterian Church. Subsequently the formation of the General Assembly took place. This judicature, at its first meeting, A. D. 1829, at Princeton, Kentucky, made such changes in the form of government as were demanded by the formation of this new court.

In compiling the confession of faith the fathers of the Cumberland Presbyterian Church had one leading thought before them and that was to so modify the Westminster Confession as to eliminate therefrom the doctrine of universal foreordination and its legitimate sequences, unconditional election and reprobation, limited atonement and divine influence correspondingly circumscribed. All the boldly defined statements of the doctrine objected to were expunged and corrected statements were made. But it was impossible to eliminate all the features of hyper-Calvinism from the Westminster Confession of Faith *of Faith* by simply expunging words, phrases, sentences, or even sections and then attempting to fill in the vacancies thus made by corrected statements or other declarations, for the objectionable doctrine with its logical sequences pervaded the whole system of theology formulated in that book.

The compilers knew this and they also knew that a book thus made must necessarily have some defects. Still, they felt assured that they had prepared one which could not be fairly and logically interpreted without contradicting the most objectionable features of hyper-Calvinism; and they felt too that they had formulated a system of doctrines which any candid inquirer after truth might understand. They did not, however, claim that the time would never come when there might be a demand for a restatement of these doctrines, which would set forth fully more clearly and logically the system of theology believed and taught by the Presbyterian Church. That time did come and so general was the desire throughout the church to have the confession of faith revised that at the general assembly which convened in the city of Austin, Texas, A. D. 1881, a paper was introduced looking to that end and it was adopted by an unanimous vote.

In view of the great importance of the work two committees were appointed and it was made the duty of the first committee to revise the confession of faith and government and of the second to review and revise the work of the first. The committee met at Lebanon, Tennessee, the seat of Cumberland University, where every facility

could be enjoyed for such labors, having free access to a fine
211 theological library. After bestowing great labor upon their work, giving every item earnest and prayerful attention, the committees completed the tasks assigned them and the results of their labors were published in pamphlet form and in the weekly papers of the church for information, that criticism might be made by those desiring to do so. The committees, after receiving these criticisms, again met and remained in session for a number of days, giving careful attention and prayerful consideration to all the suggestions made. They then completed their work without a single dissent and submitted the result to the general assembly *with* convened in the city of Huntsville, Alabama, A. D. 1882. That general assembly, in committee of the whole, considered with great patience and care every item in the entire book, taking a vote on each one separately and at the close of each chapter or subject taking a vote on it as a whole. In this way the entire book, from beginning to end, was carefully and prayerfully scrutinized and necessary changes were made, the most of them verbal; and there was not in the final vote a single negative.

Having completed its work the general assembly transmitted the book to the presbyteries for their approval or disapproval. The reports from the presbyteries to the next general assembly, which convened in the city of Nashville, Tennessee, A. D. 1883, showed that this work had been almost unanimously adopted. The general assembly, having reviewed these returns from the presbyteries, formally declared said book to be the Confession of Faith and Government of the Cumberland Presbyterian Church.

The accuracy of the foregoing sketch is attested by the general assembly itself, which in 1885 ordered its insertion as a preface to the "Confession of Faith and Government" adopted in 1883. That was the last confession of faith and government adopted by the Cumberland Presbyterian Church and, as respondents insist, is now in full force and effect. It was prepared, considered and adopted with too much care and solemnity to be lightly handled and indifferently cast away only twenty-three years later. It is the same printed book filed as exhibit A to the bill in this cause.

The Cumberland Presbyterian Church is only four years less than one century old. It has always been and, as respondents insist, now is, a separate, independent, voluntary religious association, controlled and governed according to its confession of faith and government, as indicated in the sketch quoted. Though unincorporated itself some of its boards and institutions are chartered under the laws of Tennessee, Kentucky, and other states. From the time of its
212 humble beginning in the year 1810, as aforesaid, to the last meeting of its general assembly in the month of May, 1906, the Cumberland Presbyterian Church extended its influence and organization into numerous states; and, at the latter date, as shown by the minutes of the general assembly, the church had 17 synods, 114 presbyteries, 1514 ordained ministers, 9614 ordained elders, 3914 ordained deacons, 2869 congregations and a total membership of 185,212.

The general assembly at Nashville, Tennessee, in 1903, appointed a committee on Presbyterian fraternity and union to confer with like committees of other presbyterian bodies, "in regard to the desirability of closer affiliation and organic union among members of the presbyterian family in the United States."

This committee reported to the general assembly at Dallas, Texas, in 1904, that it had agreed with a like committee of the Presbyterian Church in the United States of America, that each of the two committees should submit to its own general assembly their joint report, favoring the reunion and union of the two churches in one under the name of the Presbyterian Church in the United States of America, upon the doctrinal basis of its Confession of Faith as revised in 1903, and of its other doctrinal and ecclesiastical standards and upon certain considerations and recommendations contained — the said report. The general assembly adopted that report by a close vote and referred the "basis of union" to the presbyteries of the Cumberland Presbyterian Church for their approval or disapproval.

The next general assembly, which met at Fresno, California, 1905, appointed a special committee to consider and report the result of the action taken by the presbyteries. This committee divided and presented a majority and a minority report. The majority report was adopted by a close vote and the moderator declared that a majority of the presbyteries had approved the proposition of union submitted to them. In the minority report and also in a separate paper filed by those voting for the minority report an earnest protest was made. The vote on the majo-ity report was 137 in the affirmative and 111 in the *the* negative. Both reports recited that sixty presbyteries had voted approval and fifty-one disapproval. A tabulated statement exhibited with the majority report showed, however, that the fifty-one presbyteries disapproving had 137 more presbyterian votes than the sixty presbyteries approving.

The committee on fraternity and union was then increased by the addition of *ther* members and directed to ascertain and report at the next meeting of the general assembly such other steps as might be deemed necessary for the completion of the proposed union.

213 The general assembly at Decatur, Illinois, in May, 1906, received and by a majo-ity vote adopted the report made by this enlarged committee; and over the protest of a large minority, the moderator declared the basis of reunion and union to be in full force and effect. After the passage of a resolution to that end by the same majority and over the vote and protest of the same minority, the moderator declared the general assembly adjourned sine die as a separate assembly, to meet in and as a part of the 119th general assembly of the Presbyterian Church in the United States of America on the third Thursday in May, 1907, at a place not named. The protest was made and filed before the roll call on adjournment and before the declaration thereof was made by the moderator. The protest being disregarded and the purpose of the majority to adjourn without day and without naming the place for another meeting being persisted in, they were informed on the floor

of the assembly before the adjournment actually took place that the minority would treat the adjournment as illegal and ineffectual and would continue the session of the general assembly thereafter and immediately upon the announcement of the adjournment as aforesaid, and before the majority had actually dispersed, respondent J. H. Fussell, one of the minority, announced in a loud voice in the hearing of majority and minority commissioners, then in the assembly hall, that the business of the general assembly would be resumed at once in the G. A. R. hall near by, the church in which the previous part of the session was held being refused for that purpose. The minority commissioners then repaired to the hall indicated and there elected a moderator, the respondent J. L. Hudgins, and other officers to fill the places of those who had gone away; and having done this the attempted adjournment a short time before and the previous declaration that the reunion and union were in full force and effect were treated as ineffectual and rescinded because deemed unauthorized and illegal; and then the unfinished business of the general assembly was transacted and the assembly adjourned to meet again on the third Thursday *on* May, 1903, at Dickson, Tennessee.

The bill filed in this cause goes upon the erroneous assumption that the aforesaid steps on the part of the general assembly and presbyteri*en* of the Cumberland Presbyterian Church and similar steps in the main on the part of the general assembly and presbyteries of the Presbyterian Church in the United States of America have effectuated a reunion and union between the two churches and completely merged the Cumberland Presbyterian Church, its ministry, membership and property into the Presbyterian Church in the United States of America.

214 Respondents deny that assumption in toto. They say there was no constitutional power in the Cumberland Presbyterian Church to form and accomplish such a union and merger and that every step taken to that end by the presbyteries and general assembly of that church was in violation of its constitution, ultra vires and void. The constitution was and is the supreme law of the Church. It is found in a printed book called, "Confession of Faith and Government of the Cumberland Presbyterian Church," that book being the same whose preface has been set out in this answer. The courts of the church are named and their powers defined in the constitution in regular *gfadation*. "These courts are denominated church-sessions, pr*C*sbyteries, synods, and the general assembly," (sec. 24); "and the jurisdiction of these courts is limited by the expres*sion* provisions of the constitution." (sec. 25.) The powers of the general assembly are specifically enumerated in section 43 as follows:

"The general assembly shall have power to receive and decide all appeals, references and complaints regularly brought before it from the inferior courts; to bear testimony against error in doctrine and immorality in practice, injuriously affecting the church; to decide all controversies respecting doctrine and discipline; to give its advice and instruction in conformity with the government of the

church in all cases submitted to it; to review the records of the synods; to take care that the inferior courts observe the government of the church; to rederess whatever they may have done contrary to order; to concert measures for promoting the prosperity and enlargement of the church; to creatie, divide or dissolve synods; to institute and superintend the agencies necessary in the general work of the jurisdiction; to suppress sc-ismatical contentions and disputations according to the rules provided therefor; to receive ubder its jurisdiction other ecclesiastical bodies whose organization is conformed to the doctrines and order od this church; to authorize synods and presbyteries to exercise similar power in receiving bodies suited to become constituents of those courts and lying within their geographical bounds, respectively; to superintend the affairs of the whole church; to correspond with other churches; and, in general, to recommend measures for the promotion of charity, truth and holiness throughout the church under its care."

Manifestly this enumeration, full and elaborate as it *us*, does not as respondents are advosed and believe, include power to form and accomplish a union and merger of this church with and into
215 another church. It does not even authorize the general assembly to make or entertain a proposition on such a subject. The jurisdiction of the general assembly being thus limited by the constitution to the express provisions thereof and these provisions not conferring the powers in question it must follow inevitably that the union and merger attempted and all stages taken for the accomplishment thereof were without constitutional authority and therefore, illegal, ultra vires and void.

Self-destruction or self-surrender was foreign to the thoughts and language of the franers of the constitution. The possibility of such a catastrophe was not contemplated by them. No power to accomplish such result was given by them, none can be inferred. The express limitation of the powers of the general assembly and of the prrsbyteries to certain enumerated subjects is equivalent to a positive prohibition against the usurpation of any other power as respondents are advised and believe. Nor can it avail the complainants anything that the constitution was subject to amendment under section 60 thereof; for no amendment was in fact made or even proposed.

But, of there had been the most ample constitutional power in the general assembly and presbyteries in the Cumberland Presbyterian Church to form a union with and to effectuate a merger with another church conformed to its doctrine and *orer* completely or even substantially respondents would still insists that the union and mereger asserted by the complainants are illegal, inoperative and void, because the Presbyterian Church in the United States of America is not the same or substantially of the *d*ame faith and order. The doctrine of the two churches was and is absolutely variant and irreconciliably antagonistic on certain essential and substantial subjects and points. The differences that lead to the formation of the Cumberland Presbyterian Church still exist in the main, as will appear to the court from the following quotations:

Confession of Faith of the Presbyterian Church in the United States of America (1788).

Chapter III. Of God's Eternal Decrees.

III. By the decree of God for the manifestation of his glory some men and angels are predestinated unto everlasting life, and others foreordained to everlasting death.

IV. These angels and men, thus predestinated and foreordained are particularly and unchangeably designed; and their number is so certain and definite that it cannot be either increased or diminished.

V. Those of mankind that are predestinated unto life, God before the foundation of the world was laid according to his eternal
216 and inscrutable purpose and the secret counsel and good pleasure of his will hath chosen, in Christ unto everlasting glory out of his mere free grace and love, without any foresight of faith or good works or perseverance in either of them or any other thing in the creature, as conditions of causes moving him thereunto; and all to the praise of his glorious grace.

VI. As God hath appointed the elect only to glory, so hath he, by the eternal and most free purpose of his will foreordained all the means thereunto. Wherefore they who are elected being fallen in Adam, are redeemed by Christ, are effectually called unto faith in Christ by his spirit working in due season; are justified, adopted, sanctified, and kept by his power through faith unto salvation. Neither are any other redeemed by Christ, effectually called, justified, adopted, sanctified, and saved, but the elect only.

VII. The rest of mankind God was pleased, according to the unsearchable counsel of his own will, whereby he extendeth or withholdeth mercy as he pleaseth for the glory of his sovereign power over his creatures, to pass by and to ordain them to dishonor and wrath for their sin, to the praise of his glorious justice."

"Declaratory Statement, 1902-03.

With reference to chapter III of the Confession of Faith: that concerning those who are saved in Christ, the doctrine of God's eternal decree is held in harmony with the doctrine of his love to all mankind, his gift of his son to be the propitiation for the sins of the whole world and his readiness to bestow his saving grace on all who seeketh. That concerning those who perish the doctrine of God's eternal decree is held in harmony with the doctrine that God desires not the death of any sinner, but has provided in Christ a salvation sufficient for all, adapted to all, and freely offered in the gospel for all; that men are fully responsible for their treatment of God's gracious offer; that his decree hinders no man from accepting that offer; and that no man is condemned except on the ground of his sin."

Larger Catechism (1788).

Q. 67. What is effectual calling?

A. Effectual calling is the work of God's almighty power and grace, whereby (out of his free and especial love to his elect and from nothing in them moving him thereunto) he doth in his accepted time invite and draw them to Jesus Christ by his word and spirit; savingly enlightening their minds, renewing and powerfully determining their wills, so as they (although in themselves 217 dead in sin) are hereby made willing and able freely to answer his call and to accept and embrace the grace offered and conveyed therein.

Q. 68. Are the elect only effectually called?

A. All the elect, and they only, are effectually called; although others may be and often are outwardly called by the ministry of the word and have some common operations of the spirit; who, for their wilful neglect and contempt of the grace offered to them, being justly left in their unbelief, do never truly come to Jesus Christ.

Chapter X (1788). Of Effectual Calling.

III. Elect infants, dying in infancy, are regenerated and saved by Christ through the spirit, who worketh when and where and how he pleaseth. So also are all other elect persons who are incapable of being outwardly called by the ministry of the word."

Declaratory Statement (1902-03).

With reference to chapter X, section 3 of the Confession of Faith, that is not to be regarded as teaching that any one dying in infancy are lost. We believe that all dying in infancy are included in the election of grace and are regenerated and saved by Christ through the spirit who when and where and how he pleaseth. See pages 20-25, 57, 138*b*, 175-6 of exhibit to the bill.

Confession of Faith of the Cumberland Presbyterian Church, 1883.

Decrees of God.

8. God, for the manifestation of his glory and goodness by the most wise and holy counsel of his own will, freely and unchangeably ordained or determined what he himself would do, what he would require his intelligent creatures to do and what should be the awards, respectively, of the obedient and the disobedient.

9. Though all divine decrees may not be revealed to men, yet, it is certain that God has decreed nothing contrary to his revealed will or written word.

Free Will.

God in creating man in his own likeness endued him with intelligence, sensibility and will, which form the basis of moral character and render man capable of moral government.

35. The freedom of the will is a fact of human consciousness and is the sole ground of human accountability. Man in his state of innocence was both free and able to, keep the divine law, also to violate it. Without any constraint from either physical or moral *cuases* he did violate it.

218

Divine Influence.

38. God the father having set forth his son Jesus Christ as a propitiation for the sins of the world does most graciously vouchsafe a manifestation of the holy spirit with the same intent to every man.

Regeneration.

54. All infants dying in infancy and all persons who have never had the faculty of reason are regenerated and saved. See pages 14, 26, 28 and 36 of exhibit A to the bill.

It is not believed by respondents that these declaratory statements have made any change or alteration in the original and objectionable sections of the Westminster Confession of Faith referred to therein. Indeed these statements do not purport to be more than mere explanation, which could have been made as well and as consistently in 1788 or 1810 as in 1903, the English language in which the confession of faith was written being the same all the while. Besides it is logically impossible that those statements have altered or changed the original book whose language remains unaltered and unchanged. Moreover the Larger Catechism, which was and is equally objectionable is not even mentioned in either of the two declaratory statements.

The general assembly of the Presbyterian Church, in 1904, passed a series of resolutions, one of which was intended to refute the supposition that its creed had been varied by the revision in 1903. That resolution was in the language following: "Resolved, 4, That the assembly, in connection with this whole subject of union with the Cumberland Presbyterian Church, placed on record its judgment that the revision of the confession of faith effected in 1903 has not impaired the integrity of the system of doctrine contained in the confession of faith and taught in the holy scripture, but was designed to remove misapprehension as to the proper interpretation thereof."

Should it satisfy Cumberland Presbyterians to tell them that the founders of their church labored under a "misapprehension as to the proper interpretation" of those parts of the Westminster Confession of Faith leading to the separation in 1910 and that the suggestion in 1903 Declaratory Statements, of the supposed proper interpretation renders the creeds of the two churches identical or substantially so? Respondents think not. The original text of the objectionable sections has been reproduced literally in the book of 1903 and the added chapters relate to different doctrinal points.

The proposition attempted to be submitted to the presbyteries by

the general assembly at Dallas may be said to have been in-
219 tended to effect some amendment to the confession of faith of the Cumberland Presbyterian Church. If so, the attempt as respondents are advised and believe, was inevitably abortive, because no definite and specific amendment was proposed in the general assembly and by it definitely and positively approved. The joint report on the subject of union was adopted and resolution was passed directing that the basis of union therein recited "be and is recommended to the presbyteries of the Cumberland Presbyterian Church for their approval or disapproval." But neither that report nor the resolution for submission can, as respondents are advised and believe, properly be treated as a proposed amendment to the confession of faith. "The basis of union" was the thing submitted to the presbyteries and the language of the submission was:—"Do you approve of the reunion and union of the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church on the following basis: The union shall be effected on the doctrinal basis of the confession of faith of the Presbyterian Church in the United States of America, as revised in 1903, and of its other doctrinal and ecclesiastical standards; and the scriptures of the old and new testaments shall be acknowledged as the inspired word of God, the only infallible rule of faith and practice." This question propounded to the presbyteries, as respondents are advised and believe, has none of the essential elements of an amendment. It was not proposed or passed by the general assembly as an amendment, or by that body recommended to the presbyteries as such and besides it is not sufficient in form.

To be effective as an amendment the written paper, proposition or resolution so intended must, as respondents are advised and believe, recite the exact and entire language of the change designed to be made in hæc verba, or at least exhibit some paper containing it. Neither was done or attempted to be done in the case now before the court. The same particularity or procedure as that used by the general assembly and presbyteries in reference to the book adopted in 1883 by them is requisite to a valid amendment of either the confession of faith or the constitution of the church. Respondents say additionally upon the question of amendment that a mere recommendation of a given proposition to the presbyteries for their approval or disapproval, without the previous approval of the general assembly itself of the proposition by a two-thirds vote does not meet the constitutional requirement and is simply nugatory. The general — as respondents are advised and believe, is required first by the constitution to express its own judgment in favor of a proposed
amendment before submitting it to the presbyteries for their
220 approval. This it did not do in the present instance and for that reasons, if every other step had been regular and the frame of the proposal or intended amendment perfect, the action of the presbyteries and all subsequent action of the general assembly *were* illegal and ineffectual, as respondents are advised and believe.

The submission or recommendation to the presbyteries was in fact made without any previous and definite approval of the s-called

union and basis of union on its part. The absence of such approval was observed and commented upon by commissioners in the general assembly at the time the submission to the presbyteries was made and more than a sufficient number of them to have changed the result and defeated the proposed submission voted for it in the belief and upon the statement of the moderator, then presiding, that the action then being taken was not intended as an expression of the general assembly's judgment in favor of union on the proposed basis, but only as a mere reference of the question to the presbyteries for their approval or disapproval. Those commissioners, as respondents are informed and believe, would otherwise have voted against the submission and defeated it.

The attention of the general assembly in 1905 and again in 1906 was, by the written protest of those opposing union, brought to the numerous grounds of *of* objection entertained by them to the consummation of the union; and in that way ample notice was given of their purpose to do all reasonably within their power and within the law to perpetuate the name, life and usefulness of the Cumberland Presbyterian Church.

It is no doubt true that many of the best informed and most efficient members of the Cumberland Presbyterian Church, as well as many of those not so well informed and not so efficient, from 1810 to the present time, have thought that the general cause of Christianity might be promoted by the union of all branches of the presbyterian family in the United States, whenever it could be done upon the basis of the Cumberland Presbyterian creed. But none of either class, so far as respondents know, were ever until recently willing even to consider the matter of surrendering the name of their church and its confession — faith for the sake of union with any other body or bodies. Cumberland Presbyterians have always been willing that others shall see the light as they see it and join them in spreading the gospel as they understand it. They have always been willing for others who could conscientiously do so to come to them in their doctrine; but never before the recent movement by complainants and other unionists was connection with any
221 other body upon different terms thought of so far as respondents know.

Respondents deny that the great bulk of the ministry and membership of the Cumberland Presbyterian Church have ever at any time realized that there was no longer any reason why this church should not be united with the Presbyterian Church in the United States of America. Some of them seem to have thought for a few years such a union desirable. At least two-thirds of the entire membership, however, as these respondents believe, have ever thought and do not think such a union desirable; but on the contrary regard it as very undesirable and feel that the complainants and others who entertain a different view are making a great mistake in undertaking to compel loyalists to submit to the union against their will and over their conscientious convictions. It must be apparent — all, intelligent and thoughtful persons that the effort at coercion can result in no good to any one and that the union without unity can

but be dishonoring to God and discreditable to those who insist upon union over the conscientious protests of their brethren.

It may be true that "very unusual and very precautionary measures were adopted for the selection" of the first committee on fraternity and union in 1903. Respondents are not prepared to admit, however, that this was done that the committee "might be truly representative in its character." A few of the presbyteries memorialized the general assembly at that session on the subject of union. The most of these were opposed to it and the great majority of the presbyteries gave no expression on the subject. Several of the ministers then in favor of a suitable union were members of that body, one of the number being made chairman of the committee then appointed.

Respondents deny that the minutes of the general assembly at Dallas in 1904 furnished full information as to the supposed revision of the confession of faith of the Presbyterian Church in the United States of America. Besides, had it done so, comparatively few of the entire membership and a small proportion of the entire membership of the church ever saw or had access to those minutes. No means of informing the eldership or the membership below the grade of sessional clerk in reference to the supposed revision or any action taken in reference to the so-called union were adopted by the general assembly or by those urging the union. Failure in that respect is not now a matter of surprise to respondents or of regret to the complainants, who in their bill and otherwise press the con-
-tion that the congregations have no rights that are to be regarded in this matter and say that everything concerning the church its
222 ministry, its membership and its property rests exclusively with the general assembly and the presbyteries.

Respondents are informed and believe that those in the Presbyterian Church in the United States of America, ministers and laymen, are not harmonious on the question of union; that two members of its committee dissented from the joint report, a respectable minority voted against its adoption and many of its membership, ministers and laymen, were from the first and are now unalterably opposed to the so-called union upon various grounds, among them, that it is calculated to produce inevitable discord in both of the churches, thereby hindering and retarding the usefulness of both churches and the general growth of Christianity.

That church, it is conceded has taken steps to amend its constitution in reference to the separation of the races in certain presbyteries and synods; but that amendment, instead of making the right of such separation absolute, as provided in the first recommendation of the joint report to the general assembly in 1904, at Dallas, makes such right dependent upon the consent of the other race (the one not seeking the separation) in every case. In this particular the separation amendment actually made falls far short of that recommendation and is consequently no compliance at all; and the non-compliance in this particular on the part of the Presbyterian Church in the United States of America, as respondents are advised and believe, is so vital an element in the proposition of union submitted to and acted

upon by the general assembly and presbyteries of the Cumberland Presbyterian Church, as aforesaid, as to render their action thereon inoperative and to relieve them and the church from the legal consequences that might otherwise be said by the complainants to follow from such action. The difference between the promise and the fulfillment is vital.

After the action of the general assembly at Dallas, in 1904, there was considerable discussion of the question of union in the official organ of the Cumberland Presbyterian Church published at Nashville under the name Cumberland Presbyterian. But after a short while this discussion was conducted mainly and almost entirely by those favoring union, communications from those opposing it being rejected by the editor, who was himself a warm advocate of union. At the beginning the then editor did not favor union on the basis proposed. Yet he was impartial so far as the columns of the paper were concerned and permitted both sides to be heard through that medium. This attitude of the paper not being satisfactory to the nionists continued for a short time only.

223 Some of the most influential among the unionists were likewise influential, as respondents are advised and believe, in leading the impartial editor reluctantly to resign and accept in a distant city a larger, more lucrative, position, which turned out to be short-lived and soon vanished. In his stead as editor of the Cumberland Presbyterian was placed a designed and designing unionist, who turned this organ of the church, in its editorials and communications, against those who seek to preserve the church and call themselves loyalists and to the support of those, on the other hand who call themselves unionists. The paper has been so used from that time until the present, unwarrantably, vigorously and even coercively as will abundantly appear from its files. The partisan course pursued by this editor in turning the organ of the church against a large portion of its ministry, eldership and membership gave the unionists a very great and very unjust advantage, thereby forcing the loyalists in self defence and for self-protection to resort to another paper called Cumberland Banner. This paper, being now and having but small capital, though a worthy periodical, did not have and could not have been expected to have a circulation and influence comparable to those of the Cumberland Presbyterian, which, though the property of the entire church and of one member as much as of any other member, had been so unjustifiably and so unfairly converted into a partisan paper and turned against those in conscience and justice equally entitled to its recognition and support. Never were those not in favor with "the powers that be" more unjustly treated. Never were equal owners more ruthlessly deprived of the equal use and benefit of the joint property.

The statement made in the fourth paragraph of the bill in reference to the increased membership of the committee on union is misleading, in that it would make the impression that eight of the nine new members were, when named, opposed to the union, and that the committee so enlarged, with one exception, favored the final consummation of the union in a report submitted to the general assem-

bly at Decatur in 1906. The truth is that four of the eight declined to serve and their places were filled by — union moderator with unionists.

It is supposed to be true that the general assembly of each of the two churches convened on the same day and at Decatur, Illinois, and Des Moines, respectively.

Respondents admit that defendant J. H. Fussell and others presented an injunction bill against J. B. Hall and others to the honorable W. C. Johns at Decatur, on the 16th day of May, 1906,
224 for a fiat to restrain the said committee from making its report and to restrain the general assembly from acting on that report when made. The defendants demurred to the bill. Argument was heard for both sides on the application for injunction and also on the bill and demurrer. A fiat was refused. The demurrer was sustained and the bill dismissed and from that action of the court the complainants appealed and the appeal is now pending. The pendency of that suit respondents insist can have no proper bearing upon the present suit.

The final report of the committee was accepted and the joint report on reunion and union was adopted by the general assembly of the Cumberland Presbyterian Church on the 23d day of May, 1906, by a vote of 165 to 91; but in reality the number of commissioners who would have voted in the negative if present was 106. The minutes of the assembly recite the names of 12 of the 15 absentees who would have voted in the negative if present.

A written protest, signed by 100 commissioners and which would have been signed by the other 6 loyal commissioners if present, at the moment, was presented and filed immediately after the vote was taken. The protest with its signatures appears on pages 79 and 80 of the minutes of 1906. Thereafter an effort was made by the unionists to adjourn the assembly sine die, as before stated. Respondents say they are advised and believe that attempt was abortive and of no legal consequence whatever because in violation of section 41 of the constitution of the church which requires each adjourning order of that body to name both time and the place of its next meeting, which was not done in this instance. That provision is found on page 100 of exhibit A to the bill.

Whatever the general assembly may have intended and attempted to adjudge, if anything, by adopting the report of its committee on over- in 1903, and the joint report on union and reunion in 1904 and the majority report of the special committee in 1905 and the joint report in 1906, these respondents deny that it had lawful power in that manner to adjudge that the so-called union had been constitutionally agreed to by the Cumberland Presbyterian Church and that the basis of union had been constitutionally adopted. They also deny that it had any judicial power while acting in a legislative capacity (as it was in doing the things referred to in the last sentence) to adjudge finally and conclusively in a judicial capacity the constitutionality of such action; or that in adopting the said reports in the years 1905 and 1906, it did decide or could decide authori-

tatively that there then existed substantial identity in the creeds of the two churches.

225 The question of identity in the two creeds, as respondents are advised and believe, could not be decided or even raised legally in the manner indicated. No proposition or resolution affirming such identity was submitted to the general assembly at any time, either as a matter of original cognizance or by appeal from an inferior court of the church. No such question has at any time been submitted to the general assembly and no such question has at any time been decided by the general assembly. These respondents again deny that such identity exists and they again assert that the two creeds in the vital points emphasized by the fathers as hereinbefore indicated are absolutely inconsistent and irreconcileable.

Respondents deny that all members of the Cumberland Presbyterian Church, or any of them so far as respondents know, ever promised either expressly or impliedly to abide by and support the rules and regulations of the church and to submit to its constituted authorities in the sense indicated by the complainants in their bill. Speaking for themselves, respondents say most respectively that in assuming the obligations prescribed in the directory for worship it was not contemplated by them or either of them or by the person or persons administering those vows, that the church would be or could be merged into another church and that respondents would thereby be expected and required to give allegiance to the other church, or to persons of their own church who should in the future favor such a merger and attempt by whatever means to accomplish it. They deny most positively that they are under any obligation, either legal or moral, to acquiesce in the action of the general assembly and the presbyteries in reference to the so-called union; or that those obligations if they existed, would or could be strengthened by the decision of an inferior civil court whose decree has been vacated by appeal.

The decree of a chancellor when appealed from is not to be regarded by either the winning or the losing litigant "as prima facie correct." The case in that plight, as respondents are advised and believe, stands for trial de novo in the appellate court.

It may be true that "complainants are advised and believe that the general assembly and presbyteries would have had the implied power to form the union had the constitution not expressly granted it" and that "they are advised and believe that the constitution does expressly grant powers which amount to the power to form the union"; but respondents cannot admit that such advice is sound in law or that such belief is well founded in fact. They deny that any of the church courts have or had any power or jurisdiction at all,

226 because as stated in the constitution itself "the jurisdiction of these courts is limited by the express provisions of the constitution"; and they further deny that the constitution expressly grants "powers which amount to the power to form the union." The powers granted to the general assembly have been set out in full in this answer and no one of them relates in any way to such a union. Just how any number or combination of those enumerated powers

that do not singly or separately refer to the subject of union, can be logically or legally said to "amount to the power to form the union," respondents cannot understand; and they deny that it is true.

They do not know what complainants are advised and believe on the subject, but they deny that the sovereign power of the church was or is vested in its general assembly and presbyteries in such sense that those bodies may destroy the church by merging it into another organization or otherwise or that they can exercise any power or jurisdiction other than that expressly conferred upon the- by the constitution. If that were true the constitution would have no office to perform as to those bodies and they could indeed disregard its provisions altogether as the complainants intimate they may rightfully do. It is true that those bodies were in a certain sense the makers of the confession of faith and the constitution and other ecclesiastical standards; yet, that does not imply that they can disregard the work of their own hands while in existence or destroy it at will and without the observance of prescribed forms and procedures. Those bodies were first made themselves and they owe something to those who made them. It is not sovereign power but constitutional power, as respondents are advised and believe, that enables the general assembly and presbyteries, pursuing prescribed methods, to change and amend the organic law of the church; and this result can be accomplished only by express amendatory provision and never by implication as claimed in the bill. A statute may be repealed by implication through the passage of another statute inconsistent with it; but that rule is not applicable to constitutional provisions, or in the present case.

Statutes inconsistent with the constitution are void because of that inconsistency and attempted constitutional amendments not framed and passed in accordance with the requirements of the constitution are void for that reason. Such non-conforming amendments do not destroy the original constitution, but fail in their object because not in conformity with that instrument.

It is conceded that the membership of the church includes men, women and children, many of whom are not so well versed
227 in creedal and constitutional questions as are the ministers and elders. So much the greater therefore, is the duty and obligation of the ministers and elders to observe and preserve the creed and the constitution and the rights thereunder of the multitude of those who are less informed. The latter deeply regret their ignorance and feel keenly the reproach that would be cast upon them on that account by the complainants and others of the better informed, self-commended and self-praised class. Nevertheless respondents have an abiding confidence that this honorable court will protect them in their legal rights and that ignorance of church law on their part will not in this tribunal deprive them of their rights in respect of property under that law.

Respondents deny that what complainants call "the decisions of the general assembly" in reference to the question of union are "correct" and they deny with even greater emphasis, if possible, that "whether correct or not they are binding upon every church member

and cannot be reviewed by the civil courts." If the so-called decisions are not correct in a true legal sense they are not binding upon any of these respondents and can be disregarded by any civil court having jurisdiction of any property or property rights supposed to be affected thereby.

Respondents are informed and believe that the legal commissioners constituting the general assembly in the G. A. R. hall all regarded themselves as the legal representatives in that body of the Cumberland Presbyterian Church and as there having legal authority to do all they did. In that opinion these respondents concur. They deny that these commissioners then and there or at any other time and place, combined and conspired to repudiate anything. Their purpose as respondents are advised and believe, was to perpetuate the Cumberland Presbyterian Church and to prevent its repudiation and destruction, especially the latter, by the complainants and their associates and sympathizers; and that in that purpose they were firm and conscientious and, as respondents believe, wholly justifiable in fact and in law. They had no purpose and laid no plans to deceive or mislead any one or to induce or encourage any unlawful act by any one. Nor have these respondents or any other loyalists, so far as they know, ever had any such purpose or laid any such plans. Respondents have said and they verily believe that the so-called union and merger have not been and cannot be legally effectuated and that the Cumberland Presbyterian Church still exists as a separate organization of Christian people with its legal status and legal rights unimpaired.

It is true that a legal committee was formed for the purpose
228 of giving legal advice when needed and that the defendant, J. H. Fussell, was made chairman of that committee. The printed circular referred to by the complainants as having been sent forth by that committee contains only such suggestions and advice as were and are believed to be sound in morals and in law. A copy of it is herewith filed, marked exhibit E and as such made a part of this answer. It speaks for itself and requires no defense of explanation from these respondents. An advisory board was also created and the defendant Eshman was made its chairman. The printed circular was issued by him as such chairman is herewith filed and marked exhibit E to this answer and as such is made a part hereof. It also speaks for itself and calls for no vindication or palliation from these respondents. It was issued in the utmost good faith.

Of their own knowledge respondents know nothing of the bill which complainants allege certain loyalists have filed in Atlanta, Georgia. They have heard that a bill has been filed in that city for the purpose of preserving to the Cumberland Presbyterian Church its house of worship there located, but they have no connection whatever with that litigation. Nor have they any connection with or personal knowledge of an injunction suit which they are informed certain unionists have brought in Corsicana, to deprive loyalists there of the possession of their local church property.

Respondents deny that they or other loyalists to their knowledge or by their consent have ever said or induced others to say that no

change whatever has been made in the creed of the Presbyterian Church in the United States of America or made any concealment of what has actually been done in that regard by that church. Some of them may have said and all of them sincerely believe that the so-called revision does not eleiminate the objectionable features of that creed which led to the*f* formation of the Cumberland Presbyterian Church. Nor have they nor others to their knowledge or with their consent, done or said anything to excite prejudice or engender hard feel*l*ings against their brethren who have espoused the cause of the so-called union or against the church into which they would go. They deny that they or others to their knowledge or with their consent have done or said anything except by way of persuasion and entreaty to *to* prevent their union brethren in any presbytery or other church court, congregation or board from going into the so-called union and promoting the same with their time, talents and money. They have urged and still urge their union brethren to stay with them in the church of their common ancestors.

229 It may be and no doubt is true that thousands of people now abstain from contributions to the so-called united church and to the Cumberland Presbyterian Church and that the cause of missions in Japan, China, Mexico, and the United States is embarrassed on account of the division caused by the agitation of union so-called. Respondents, however, say most positively and emphatically that the responsibility for *for* this unfortunate and deplorable situation and for the strife and contention in the church at this time rest wholly upon the heads of the complainants and their allies who have for months sought and still seek by injunction and otherwise to force these respondents and other lo*y*alists into the union against their wills and over other consciences. Respondents want peace; they beg for peace; and if the complainants and other unionists want to go into the other church and insist on going despite the persuasion and entreaties of loyalists they can but say regretfully, Let them go, leaving others the like liberty of conscience and action.

Respondents deny and repel with merited indignation the insinuation made by the complainants that money contributed for the cause of home missions or other religious purposes is being diverted by respondents or other loyalists from their proper and legitimate channels.

It is no doubt true that complainants Landrith and Hubbert are chairman and secretary, respectively, of the committee on pastoral oversight in what they call the united church and that as such they have express power to employ legal counsel in any litigation that may arise in any part of the Cumberland Church or in reference to any of its property. From what funds the fees of such counsel are to be paid complainants do not see fit to disclose in their bill. The fact that such power was conferred in advance of any of the litigation in question shows however that some litigation and perhaps this very bill and other- similar to it were in contemplation at the time and that it was then as now a part of the scheme of the unionists to force the loyalists by law if possible, to submit to that which their consciences did not and cannot and will never approve.

Respondents believe that they and other loyalists have a perfect legal right to assert at all times in a peaceful and becoming manner that the Cumberland Presbyterian Church still lives and to induce by a fair and legitimate statement and argument as many of its members as they can to assist in the perpetuation of its name and usefulness, notwithstanding what they regard as the illegal and ineffectual efforts of the complainants and others to accomplish the so-called union through the destruction of that name, life and usefulness.

230 The policy of respondents has been and is conciliatory and against litigation. They are advised and believe and aver as before stated that the so-called union is an absolute nullity, except as to those who voluntarily withdraw from the Cumberland Presbyterian Church, which they could have done without the so-called union; respondents deny, however, that this contention on their part and the part of other loyalists can in any true legal sense be said to cast a cloud upon the property of the Cumberland Presbyterian Church or that of its congregations. The real legal title to such *he* property being in fact in that church and in those congregations, respectively, it is impossible that the claim of ownership by loyalists should cast a cloud upon that title. The claim of owner-ship by the true owner does not constitute a cloud upon his title.

Respondents are advised, believe and aver that each separate congregation in the Cumberland Presbyterian Church is in a large sense the independent owner of its own local church property according to the terms of the instrument by which the property was acquired and that no other congregation has any especial interest or ownership therein. It was improper therefore that members of three congregations and still other persons not members of either of those congregations should be sued and impleaded. In this cause; or that members of three different alleged cong*erag*tions and still other persons not members of either of said alleged congregations should sue and plead jointly in the bill filed by the complainants or that residents of other counties should sue and be sued in Lincoln County.

Respondents suppose it is true that the complainants are understood by themselves and by each other to occupy the respective relations they claim to the Presbyterian Church in the United States of America; yet it cannot be true that any of them are now officers of the general assembly of the Cumberland Presbyterian Church, if as they claim that church ceased to exist with the alleged adjournment by them and other unionists, or if it be true, as claimed by the respondents that such adjournment was nugatory and the complainants voluntarily abandoned their re*s*tective offices in that general assembly.

Following the course of the bill, respondents again deny that the so-called union has been legally consummated and that, as a result, the title to the property of the members, judicatories, and other ecclesiastical agencies of the Cumberland Presbyterian Church has pa*s*sed by operation of law to the members, corresponding judicatories and agencies of the so-called united church. The title

231 to all such property, as respondents are advised and believe and aver, remains as and where it was before the meeting of the general assembly at Decatur in 1906.

Respondents deny that they or any of them or other persons desiring to remain in the Cumberland Presbyterian Church and intending to do so, can properly be denominated "renouncers"; or that by adhering to their firm and conscientious purpose in that behalf they vacate their respective offices in the congregations of that church and relinquish their rights in any of its property. On the contrary the unionists, complainants and others, who persist in leaving the Cumberland Presbyterian Church and in a denial of allegiance to it are in legal contemplation seceders and by that persistence and denial denude themselves of their official robes and relinquish all rights of membership and property.

Respondents further deny that the complainants have any right to maintain this bill to quiet their alleged lawful possession of any of the property of the Cumberland Presbyterian Church, its boards or congregations, or for any other purpose. They deny that the possession of any part of the said property has been unlawfully taken by these respondents or any of them or by any one else to their knowledge.

Respondents suppose it is true that the membership of the Presbyterian Church in the United States of America is more than 1,000,000, scattered over a number of states; but they deny that the number of Cumberland presbyterians who favor the so-called union with that church is more than 100,000. It is not much, if any, more than half so large. They admit that many thousands of Cumberland presbyterians are conscientiously opposed to going into that church and intend to adhere firmly and to the last to their own church. Of these respondents believe there are about 125,000.

It is denied that the complainants state any reason why they should be allowed to maintain this action, if at all, for other persons than themselves, or against other persons than those actually named as defendants. The facts alleged do not show the complainants or the defendants to be proper representatives of any other persons. Indeed they do not disclose any joint right of action between complainants at the different towns mentioned or between any of those and the other complainants; nor do they disclose any joint right of action against the defendants in any one of those towns with any of the other defendants. Respondents deny the existence of any such right on the part of the complainants and of any such liability on the part of the defendants.

Respondents, therefore, answer for themselves only. In
232 doing this they deny that they have done, participated in or encouraged any unlawful act with reference to the so-called union or any of the property of the Cumberland Presbyterian Church, its boards and congregations. Nor have they sought to create any strife or division in the church or to hinder or retard its usefulness or the usefulness of any of its enterprises or in any manner to cripple the cause of Christianity. They have sought and desired and still seek and desire that the Cumberland Presbyterian Church should be undivided and that their brethren the complainants who have caused the division should desist from further prose-

cution and thereby restore the happiness and usefulness formerly enjoyed by their church.

Respondents respectfully and earnestly ask that the injunction granted in this cause be dissolved and the religious work and worship of these respondents and of other Cumberland presbyterians — no longer embarrassed and restrained. The injunction has already greatly interrupted and in many instances caused an absolute suspension of sessional meetings, prayer meetings, sunday schools and the regular religious services of the church. Some of the houses of worship have been closed to all services because of the injunction. The Elk Presbytery and the Memphis Presbytery, both in Tennessee, have been prevented from holding their meetings. The members of these presbyteries gathered at times and places duly appointed, but on account of the pending injunction, dispersed and went back to their homes and to their people in sorrow and humiliation without transacting any business or even daring to open the presbytery with song and prayer or to do or say anything in the name of the Cumberland Presbyterian Church.

The unionists, however, as respondents are informed and believe, have gone on with their services without let or hindrance and by flaunting the injunction in the faces of loyalists, have taken advantage of them at various times and places. The unionists held what they denominated a presbytery of the Presbyterian Church in the United States of America at Memphis, Tennessee, on the 31st day of July, 1905, and without representation on their part assumed the right to direct and control Cumberland Presbyterian congregations within the bounds of the Memphis presbytery of the Cumberland Presbyterian Church. This was done after the meeting of the Elk Presbytery had been prevented and at a time when the loyal members of the Memphis Presbytery were understood to be restrained from doing or saying anything anywhere in the name of the Cumberland Presbyterian Church.

On the 29th day of July last, while the loyal pastor of the congregation at Davidson's Chapple near Trenton, was absent and
233 his church house locked, a union minister from Milan, without the pastor's knowledge went to the house with another key and against the wishes of the members and behind the protection of the injunction defiantly held services.

These respondents have no personal knowledge of the real situation at Bowen's chappel, at Fayetteville, at McKenzie and at Kenton; but they cannot believe that the loyalists at these places or at any of them are properly subject to the grave censure held against them by the complainants. The real facts of the alleged controversy at Fayetteville and at McKenzie and at Kenton are left by these respondents to be stated by their co-defendants of those congregations, respectively.

These respondents, as before stated, are conscientiously opposed to the so-called union and firm in their purpose to stand by the church of their fathers and abide its fortune, which they believe will be one of long life and great usefulness.

The official positions of respondents, J. L. Hudgins, A. N. Esh-

man, and J. H. Fussell are as heretofore stated in this answer and their conduct and convictions are as heretofore stated in this answer.

Respondent, T. A. Havron, is the editor of the Cumberland Banner, a paper which was established and which continues to be published in the interest of loyal Cumberland Presbyterians who were and are unjustly refused a hearing in the columns of the Cumberland Presbyterian in which they had and have at least an equal right with the unionists to whom it is devoted exclusively; and in the interest of the Cumberland Presbyterian Church, whose name, life and usefulness the Cumberland Presbyterian would so eagerly destroy. The paper speaks for itself. Respondent, F. A. Seagle, is president of the board of publication and attempts fatihfully to discharge his duty as such. Respondent, Hardy Copeland, is a Cumberland Presbyterian minister. Though he resided in Texas when the discussion of the union question was begun he is a native of Tennessee and is now a resident of this state. He took an humble part in that discussion in the early part of the present year and after the meeting of the general assembly at Decatur he came to Nashville and has since that time been preaching at different points in the Lebanon presbytery. He is a loyalist and on all suitable occasions has expressed himself freely against the so-called union and in favor of the preservation of the Cumberland Presbyterian Church, which he so much loves and whose doctrine, as contradistinguished from those of the Presbyterian Church in the United States of America, he so conscientiously believes. He denies that he sought to stir up division and contention anywhere or that he has for weeks or at all besieged the
234 congregations in Nashville with that view. He has visited some of the members of the Nashville congregation, who, like himself, are loyal to the Cumberland Presbyterian Church and he has engaged in some discussion, as he has thought every free man had the right to do, of what he regards as some of the doctrinal differences in the creeds of those two churches. In doing the latter he has called attention to different portions of the confession of faith of the one church and the other. He admits that he has said in substance and that he then believed and now believes that the Roman Catholic Church claims no more for its priesthood than is expressed in sections one and two of chapter 30 of the Westminster confession of faith. Those sec-ions are as follows:

"I. The Lord Jesus Christ, as king and head of his church, hath therein appointed a government in the hands of church officers, distinct from the civil magistrate.

II. To those officers the keys of the kingdom of heaven are committed by virtue whereof they have power, respectively, to retain and remit sins, to shut that kingdom against the impenitent, both by the word and censures; and to open unto penitent sinners by the ministry of the gospel and by absolution from censures, as occasion shall require."

He denies that there is attached to said sections in the Westminster confession of faith to which he has had access or elsewhere to his knowledge a foot note explaining those sections mean- nothing more than that the visible church has power to receive persons into its

membership and to exclude them therefrom, or that those sections have been a part of the Cumberland Presbyterian confession of faith since he became a minister. This respondent has never attempted to deceive any one in reference to any matter connected with or having any bearing upon the so-called union.

All the allegations of the bill not hereinbefore admitted or denied are now denied; and having fully answered these respondents pray to be hence dismissed with their reasonable costs.

J. H. FUSSELL.
J. H. ZARECOR.
J. J. McCLELLAN,
W. C. CALDWELL,
Solicitors for Respondents.

235 STATE OF TENNESSEE,
County of Gibson, ss:

Before me, G. W. Wade, a notary public of said county and state, personally appeared J. L. Hudgins, one of the respondents in the foregoing answer and made oath in due form of law that the statements therein made as of his own knowledge he knows to be true and those made on information and belief he believes to be true.

J. L. HUDGINS.

Sworn — and subscribed before me this the 15th day of August, 1906.

[SEAL.] G. W. WADE,
Notary Public.

STATE OF TENNESSEE,
County of Davidson, ss:

Before me, James Graham, a notary public of said State and co-nty, personally appeared A. M. Eshman and Hardy Copeland and J. H. Fussell, three of the respondents in the foregoing answer and made oath in due form of law that the statements therein made as of their own knowldege they know to be true and those made on information and belief they believe to be true.

A. N. ESHMAN.
HARDY COPELAND.
JOS. H. FUSSELL.

Sworn to and subscribed before me this the 24th day of August, 1906.

[SEAL.] JAMES GRAHAM,
Notary Public.

STATE OF TENNESSEE,
County of Lincoln, ss:

Before me Walter S. Bearden, Chancellor of the Chancery Court of Lincoln County, personally appeared T. A. Havron and F. A. Seagle, two of the respondents in the foregoing answer and being

duly sworn say that the statements made therein as of their own knowledge they know to be true and those made on information and belief they believe to be true.

F. A. SEAGLE.
T. A. HAVRON.

Sworn to and subscribed before me this the 19th day of September, 1906.

WALTER S. BEARDEN, *Chancellor.*

Endorsed: Filed Sept. 11, 1906. J. E. Poindexter, Clerk & Master.

236 The following memorandum opinion was handed down and filed, viz:

T. O. HELM et al.
v.
J. H. ZARECOR et al.

The jurisdictional question presented by the first plea to the jurisdiction differs somewhat from that involved in the cases of Stevens *v.* Smartt and Finley *v.* Williams, 172 Fed. 466, in the Circuit Court for the Eastern District of Tennessee, and the case of Sharp *v.* Bonham in this court, in which a memorandum opinion has this day been rendered.

1. In so far as the plea to the jurisdiction is based upon the ground that the complainants have omitted W. A. Provine and others whom they allege in their bills constitute the Board of Publication of the Cumberland Presbyterian Church and other persons who are alleged in the plea to be indispensable parties, or any members of the Presbyterian Church in the United States of America who are citizens of Tennessee and bear the same relation to the controversy that complainants do, or members of the Cumberland Presbyterian Church who reside out of the State of Tennessee and are citizens of the same states with complainants and bear the same relation to the controversy as do all Cumberland Presbyterians in Tennessee, except the members of the Board of Publication, or other persons who are alleged to be indispensable parties to the controversy, I am of opinion that the plea is not sufficient in law.

Section 5 of the Judiciary Act of March 3, 1875, ch. 137, 18 stat. 470, provides "That if, in any suit commenced in a circuit court * * * it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought * * * that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable * * * under this Act, the said circuit court shall proceed no further therein, but shall dismiss the suit." I think it is clear that this provision of the statute relates solely to the collusive making of the actual parties plaintiff or the collusive joinder of the actual parties defendant and that if the parties before the court are properly aligned as plaintiffs and defendants, it is not a ground of dismissal, in so fas as

th- jurisdictional question is concerned, that necessary parties are omitted either as plaintiffs or defendants whose presence would defeat the jurisdiction of the court. In re Stutsman County (C. C.) 88 Fed. 337, 342. In Osborne v. United States Bank, 9 Wheat. 738, 857, Chief Justice Marshall said that it might "be laid down as a rule which admits of no exception, that where jurisdic-
237 tion depends upon the party, it is the party named in the record". While therefore the omission of indispensable parties, if any would be a ground of dismissal on the merits, if they were not joined, or, if joined, and on proper alignment their citizenship was such as to defeat the Federal jurisdiction, a plea to the jurisdiction would then lie, their omission can, in the meantime, defeat the jurisdiction of the court in a controversy between the parties who are before the court.

2. While it is averred generally in the first plea to the jurisdiction that the complainants have — collusively made complainants and defendants for the purpose of showing a diversity of citizenship and creating a case cognizable in this court and re-opening a controversy practically settled by the Supreme Court of Tennessee, this plea is in my opinion insufficient in this respect in that it does not specify what parties are alleged to have been collusively made or point out the parties referred to. I am of opinion that this broad averment of the plea must be regarded as a mere conclusion of law on the part of the plea, differing in this respect from the averments of the pleas in the other cases above mentioned, in each of which the plea pointed out specifically certain parties who are alleged in fact to have been collusively aligned under the pleadings as parties defendant instead of parties complainant for the purpose of creating an apparent jurisdiction in the Federal Court, an averment which I held in the former opinions must be deemed an averment of fact. There being no such averment of fact, however, in the present plea, I am of opinion that it is insufficient in law in that regard, and as no other grounds are presented in the first plea to the jurisdiction it results that this plea must be overruled.

3. The second plea to the jurisdiction, setting up the pendency of quo warranto proceedings in the Chancery Court of Davidson County, Tennessee, brought on the relation of J. H. Zarecor and other individual defendants herein against A. C. Biddle and others to oust the defendants therein from membership in the Board of Publication in the Church and from the possession and control or management of its property and installing the said relators therein instead, is also, in my opinion, insufficient in law. Without determining whether the state court has exclusive jurisdiction to determine the title to office or membership in this corporation and whether this defence may be made on the merits to so much of the prayer of the bill as prays "that the court decree that whoever may be the members of the Board and whoever may be entitled to said management, they shall manage the corporation and administer the trust for
238 the use and benefit of said re-united church", or whether this may be a defense on the merits to any other portion of the relief prayed in the bill, under its somewhat indefinite prayers

in this respect, I am of opinion that the plea is insufficiant in law for the reason that it does not reach the whole case made by the bill, and, at the most, relates only to a portion of the relief prayed. The theory of this bill is that certain un-named persons are the true and lawful members of the defendant Board of Publication and the first prayer of the bill is that the property in question be decreed to be held in trust by this corporation for the use and benefit of the Presbyterian Church in the United States of America, or its members. As an additional prayer, a decree is also sought declaring the members of the Board and their successors elected by the reunited church to be the true and lawful members of the Board and enjoining the individual defendants from attempting to take possession of its property, with an alternate prayer that if mistaken in the relief prayed as to who constitute the Board, it be decreed that whoever may be the members of the Board and entitled to its management, they shall manage the corporation and administer its trust for the use and benefit of the reunited church. Obviously the bill goes further than to seek merely a decree as to who are the true and lawful members of the corporation, which is the only matter involved in the above named quo warranto proceedings, and seeks a decree broadly declaring the trust upon which the property of the corporation is held, and the uses and purposes for which it is to be administered by such persons as may be its true and lawful members. Plainly, therefore, the second plea to the jurisdiction, which goes merely to who are the true and lawful members of the corporation, does not go to the whole controversy presented by the bill under its prayer for relief, since even if the individual defendants be held to be the true and lawful members, a decree is still sought declaring the use for which they, as members of the corporation, shall control and manage its property.

This plea, therefore, going only to a portion of the bill, cannot be sustained as a plea to the jurisdiction to the entire bill.

4. Independently, however, of the facts alleged in the pleas to the jurisdiction and of the several grounds thereof, I am of opinion that under the provision of section 5 of the Judiciary Act of 1875, providing, "that if, in any suit commenced in a circuit court, * * * it shall appear to the satisfaction of the court, at any time after such suit has been brought * * * that it does not
239 really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court * * * the said circuit court shall proceed no further therein, but shall dismiss the suit," it becomes the duty of the court to dismiss this suit for want of jurisdiction, for the reason that it appears to my satisfaction, after careful consideration of the bill, that when the parties are properly aligned, the controversy is not really and substantially one between citizens of different states, of which the court has jurisdiction. Nashua R. R. Co. v. Lowell R. R. Co. 136 U. S. 356, 373.

I think it is clear that under the authorities cited in Stevens v. Smartt and Finley v. Williams, supra, and in accordance with the conclusions stated in the opinion in the case of Sharp v. Bonham, that the defendant Board of Publication of the Cumberland Presby-

terian Church, which is alleged to be a Tennessee corporation, is a necessary party in a suit such as the present, having as an essential object the obtaining of a decree that the property of such corporation is held by it in trust for the use and benefit of the reunited church with which the complainants are identified; that if not an indispensable party, it is at least a proper party which will be affected by a decree declaring the use for which it holds the property in trust and necessarily imposing on it the duty of holding its property of such church and no other; that in the absence of any showing of antagonism between this corporation and the complainants, it is to be aligned upon the same side of the controversy with the complainants in this suit; that no showing of such antagonism is made in the bill, it being, on the contrary, averred in the bill that said Board and its officers and members believe that the union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America has been legally formed and that thereby the Board of Publication became a corporation and institution of the reunited church and that its managers could do nothing else than report to the general assembly of the reunited church and otherwise recognize its authority and specific prayers of the bill being that the members of said Board be decreed to be the true and lawful members of said Board and that the individual defendants claiming to constitute such Board and described in the bill as "supposed members of the Board", be enjoined from taking possession of the property of the corporation or interfering with the possession, management and control of said corporation by its true and lawful members, or with their administration of the corporation and of said trust; that such re-alignment of the defendant corporation on the same side of the controversy with the complainants is not
240 prevented by reason merely of the fact that, for some reason not stated in the bill, it has declined to institute a suit in its own behalf, it nowhere appearing from the bill that the defendant corporation has surrendered possession of the corporate property to the "supposed members of the Board", or is threatening in any manner to use the corporate property in violation of the alleged trust in behalf the reunited church or that either it or its management is in any manner hostile or antagonistic to the complainants and those whom they represent in the controversy over the use to which the corporate property shall be put; and that such realignment necessarily places the defendant Board of Publication on the opposite side of the real controversy from its co-defendants, "the supposed members of the Board", who are also citizens of Tennessee and the requisite diversity of citizenship is thereby destroyed it must be held that the suit does not really and substantially involve a controversy properly within the jurisdiction of the court and the bill must be dismissed upon that ground.

The principal difficulty which I have had in reference to this question arises from the pleas to the jurisdiction filed by the defendants.

The defendants to the bill are; 1st, the "Board of Publication of the Cumberland Presbyterian Church," a Tennessee corporation,

which appears from the allegations of the bill, as above stated, to be in the actual possession of the corporate property and to be using the same for the benefit of the reunited church, of which complainants are members, under the management and control of the unnamed persons who, according to the complainants' theory, are of the true and lawful members; and second, the individual defendants named in the bill, described as "supposed members", who are alleged, in effect, to be unlawfully claiming to be members of the Board and whom it is sought to enjoin from interfering with the management of the corporation by its true and lawful members.

The pleas to the jurisdiction, however, are filed not merely in the name of the individual defendants, but also in the name of the "Board of Publication of the Cumberland Presbyterian Church" as a defendant and are signed by counsel who represnt the individual defendants who are described in the bill as "supposed members of the Board".

If these pleas are to be construed as pleas in behalf of the corp-ration which is in the actual possession of the church property and managed and controlled by the unnamed persons whom the complainants insist are its true and lawful members, then the effect of these pleas might well be to align this corporation in opposition to the complainant and on the same side of the controversy with
241 its individual co-defendants and in such case it might well be said that so far as the question of Federal jurisdiction is concerned the court would, as to the parties before the court, have jurisdiction of the controversy as one between citizens of different states.

On the whole, however, after careful consideration, giving these pleas their fair construction and effect, I do not think that they can be considered as the pleas of the defendant corporation named in the bill, being the corporation in actual possession of the corporate property and managed and controlled by the persons whom the complainants allege to be its true and lawful members, but that they are obviously pleas filed merely in behalf of the individual defendants both individually and in their alleged corporate capacity, in accordance with their claim that they are not merely the "supposed members" of the Board, but are in fact its true and lawful members. Under such construction of the pleas it is manifest that they can-ot have the effect of aligning upon the same side of the controversy with the defendants the corporation which is sued in the bill as the real corporation in possession of the property and composed of the other persons constituting, under the complainants' theory, its true and lawful members, which corporation alone is made a defendant to the bill, the individual defendants not being made defendants in their supposed corporate capacity, and that as the corporation in possession of the property and managing it for the benefit of the reunited church has manifestly not joined in the pleas to the jurisdiction or entered any appearance or filed any pleas in the case, the statu- of the litigation and the alignment of the parties under the controversy presented by the bill cannot be affected or changed by the pleas filed by the individual defendants in their alleged corporate

capacity. In other words, the filing of such pleas cannot change the real parties or the status of the real parties under the issues presented by the bill.

This being so, I do not think that the effect of these pleas is to place the defendant corporation in antagonism to the complainants, or to defeat the necessary re-alignment of such corporation, under the allegations of the bill, so as to place it on the same side of the controversy with the complainants and that since such realignment the diversity of citizenship necessary to give federal jurisdiction is thereby destroyed, the bill must be dismissed by the court for want of such jurisdiction.

An order will accordingly be entered overruling the defendants' plea as to the jurisdiction, but dismissing the bill by the court on its own motion for want of jurisdiction and in consequence de-
242 nying the motions for preliminary injunction and receivership without consideration of the merits. The complainants will pay all the costs except those incident to the filing of the pleas to the jurisdiction, which will be paid by the individual defendants.

March 26, 1910.

SANFORD, *Judge*.

243 The following claim was rendered on April 12, 1910.

Be it remembered that this cause came on to be heard upon the 28th day of March, 1910, as well as on former days, before the Hon. E. T. Sanford, Judge, etc., upon the motion of complainant to overrule the defendants' pleas heretofore filed in this cause, because the same are insufficient in law. And the court being of opinion that the said motion is well taken, orders, adjudges and decrees that the said pleas be and the same are overruled and the costs incident to filing the same will be paid by the defendants, for which let execution issue as at law.

The court being of opinion that the effect of the pleas is not to place the defendant corporation, the Board of Publication of the Cumberland Presbyterian Church, which is sued in the bill, in antagonism to the complainants and defeat the necessary realignment of said corporation under the allegations of the bill, so as to place it on the same side of the controversy with the complainants and that since such realignment the diversity of citizenship necessary to give Federal jurisdiction is thereby destroyed, the court upon its own motion therefore orders, adjudges and decrees that the bill be dismissed for want of jurisdiction and the motion for a preliminary injunction and receivership is denied without consideration of the merits. The costs of the cause, except as above indicated, will be paid by the complainants for which execution will issue as at law.

The following certificate of want of jurisdiction by the judge was filed, viz.:

No. 3590. Equity.

T. O. HELM et al.
v.
J. H. ZARECOR et al.

In this cause I hereby certify that the judgment of dismis-al herein made is based solely on the ground that the record does not show that the controversy involved is one, in my opinion, between citizens of different states, but that it appears from the record that one of the defendants, to-wit: Board of Publication of the Cumberland Presbyterian Church, a corporation, is not antagonistic to the complainants, and that therefore it must be aligned upon the same side of the controversy with the complainants; and that therefore some of the defendants, and one of the complainants, are, in fact, citizens of the same State, and no other ground of jurisdiction appears from the record. The case is dismissed only for the reason above stated; that is, that the controversy is not between citizens of different
244 states, and consequently the Circuit Court of the United States has no jurisdiction.

This certificate is made conformable to the Act of Congress of March 3, 1891, Chapter 517, and the opinion filed herein is made a part of the record, and will be certified to and sent up as a part of the proceedings, together with this certificate.

Dated this 13th day of April, A. D., 1910.

EDWARD T. SANFORD,
U. S. District Judge, Holding the Circuit Court.

Endorsed: Filed April 13, 1910, H. M. Doak, Clerk.

The following petition for appeal was filed, to-wit:

T. O. HELM et al.
v.
J. H. ZARECOR et al.

The above-named complainants, conceiving themselves aggrieved by the decree made and entered on the 12th day of April, 1910, in the above-entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States. Dated this 12 day of April, 1910.

ALEX. P. HUMPHREY,
JOHN M. GAUT,
Attorneys for Plaintiffs.

Allowed by
E. T. SANFORD, *Judge.*

Endorsed: Filed April 12, 1910, H. M. Doak, Clerk.

The following assignment of errors was filed, viz:

T. O. HELM et al.
v.
J. H. ZARECOR et al.

The complainants pray an appeal from the final decree of this court to the Supreme Court of the United States and assign for error:

First. That the court erred in holding that the defendant corporation, the Board of Publication of the Cumberland Presbyterian Church, is not antagonistic to the complainants in this cause;

Second. That the court erred in holding that in the absence of any showing of antagonism between the defendant corporation, the Board of Publication of the Cumberland Presbyterian Church, and the complainants, said corporation is to be aligned upon the same side of the controversy with the complainants in this suit.

Third. That the court erred in holding that when the
245 parties are properly aligned according to interest, the defendant corporation, the Board of the Cumberland Presbyterian Church, will be found on the same side of the controversy with the complainants;

Fourth. That the court erred in holding that this cause was not a controversy between citizens of different states, and that the court did not have jurisdiction thereof;

Fifth. That the court erred in dismissing complainants' bill.

Wherefore the complainants pray that the decree of the said Circuit Court be reversed.

ALEX. P. HUMPHREYS,
JOHN M. GAUT,
Attorneys for Complainants.

Endorsed: Filed April 12, 1910, H. M. Doak, Clerk.

The following order granting appeal was entered, viz:

T. O. HELM et al.
v.
J. H. ZARECOR et al.

This day came T. O. Helm et al., being all the complainants in the above styled cause, and presented their petition for an appeal and an assignment of errors accompanying the same, which petition upon consideration of the court is hereby allowed and the court allows an appeal to the United States Supreme Court upon the filing of a bond in the sum of five hundred dollars, with good and sufficient security to be approved by the clerk of this court.

The following bond for appeal was filed, to-wit:

Know all men by these presents that we, T. O. Helm, Thos. M. Cobbs and Thos. H. Perrin, as principals and W. W. Wilkerson, as sureties, are held and firmly bound unto J. H. Zarecor and others in the full and just sum of five hundred dollars to be paid to the said

J. H. Zarecor and others, certain attorneys, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents. Sealed with our seals and dated this the 22nd day of April, 1910. Whereas lately at *at* a circuit court of the United States for the Middle District of Tennessee, in a suit depending in said court, between T. O. Helm, Thos. C. Cobbs and Thos. H. Perrin, plaintiffs and J. H. Zarecor and others, defendants, a decree was rendered against the said T. O. Helm and others, plaintiffs, and the said T. O. Helm and others, plaintiffs, having obtained an appeal and filed a copy thereof in the clerk's office of the said court to reverse the decree in the aforesaid suit, and a cita-
246 tion directed to the said J. H. Zarecor and others, citing and admonishing them to be and appear at *at* a session of the Supreme Court of the United States to be held on the 20 day of Sept. inst., at Washington, D. C. Now the obligation of this bond is such that if the said T. O. Helm and others shall prosecute their appeal to effect and answer all damages and costs if they fail to make their plea good, then the above obligation shall be void; otherwise to remain in full force and virtue.

T. O. HELM ET AL.,
Appellants,
By JNO. M. GAUT, *Sol'r.*
W. W. WILKINSON, *Surety.*
W. E. WARD, *Surety.*

Sealed and delivered in the presence of:
H. M. DOAK, *Clerk.*

Approved by:
H. M. DOAK, *Clerk.*

Endorsed: Filed April 25, 1910, H. M. Doak, Clerk.

The following citation was issued, to-wit:

UNITED STATES OF AMERICA,
Middle District of Tennessee, ss:

The Supreme Court of the United States of America.

To J. H. Zarecor and others, defendants in a case, No. 3590, of T. O. Helm et al. v. J. H. Zarecor et al., Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington, District of Columbia, on the 20 day of Sept., inst., pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Middle District of Tennessee, wherein T. O. Helm, Thos. B. Cobbs and Thos. H. Perrin are appellants and you are defendants, to show cause, if any there be, why

the decree rendered against the said appellants as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this the 3 day of Sept. in the year one thousand nine hundred and ten and of American Independence the one hundred and thirty-fifth year.

EDWARD T. SANFORD,
U. S. District Judge, Holding the Circuit Court.

Endorsed: Service accepted. Frank Slemmons, Attorney for Def'ts. Sept. 6, 1910.

247 I, H. M. Doak, clerk of the Circuit Court of the United States for the Middle District of Tennessee, hereby certify that the foregoing is a true, perfect and complete copy of the record in the above-styled cause, as the same is on file or of record in my office, except such parts thereof as have been omitted by virtue of a stipulation, therein included. In witness whereof I have hereunto signed my name and affixed the seal of the court, at my office, at Nashville, Tennessee, this the 6 day of Sept., 1910.

[Seal Circuit Court U. S., Middle District Tenn.]

H. M. DOAK, *Clerk.*

Endorsed on cover: File No. 22,317. M. Tennessee C. C. U. S. Term No. 696. T. O. Helm, Thomas M. Cobbs, and Thomas H. Perrin, appellants, vs. J. H. Zarecor et al. Filed September 17th, 1910. File No. 22,317.

At a Circuit Court of the United States for the Middle District of Tennessee, begun and holden, at Nashville, Tennessee, upon the second Monday of October, 1910, the following proceedings were had, to-wit:

Upon the 1st day of February, 1911, present and presiding the Hon. Edward T. Sanford, Judge, etc., a petition for appeal was filed as follows, viz:

No. 3590. Equity.

T. O. HELM et al.
vs.
J. H. ZARECOR et al.

The above-named complainants, T. O. Helm, Thomas H. Cobbs, Thomas H. Perrin, W. T. Cartwright, John H. Garner, W. B. Ward, Chas. A. Dickey, E. E. Hogshead, R. A. Cody, T. N. Mosely, W. V. Tompkins, Royal Young Graham, Mervin J. Eckels, Robert M. Patterson, Louis F. Benson, John H. Lee, John B. Laird, Robert Hunter, William W. Allen, Thomas H. Synott, John H. Converse, George L. Gillum, John H. Watts, William H. Scott, Franklin L. Sheppard, R. N. Wilson, A. R. Perkins, Bernard Gilpin, Wm. Benton Greene, Samuel McLanahan, Frank Lukens, George Hale, and Robert A. Hinckley, conceiving themselves aggrieved by the decree made and entered on the 12th day of April, 1910, in the above-entitled cause, do hereby appeal from said order and decree to the Supreme Court of the United States, for the reasons specified in the assignment of errors, which is filed herewith, and they pray that this appeal may be allowed and that a transcript of record, proceedings and papers upon which said decree was made duly authenticated, may be sent to the Supreme Court of the United States.

Dated this 1st day of February, A. D. 1911.

ALEX. P. HUMPHREYS,
JOHN M. GAUT,
Solicitors for Complainants.

The following assignment of errors was filed, viz:

No. 3590. Equity.

T. O. HELM et al.
vs.
J. H. ZARECOR et al.

The complainants, T. O. Helm, Thomas H. Cobbs, Thomas H. Perrin, W. T. Cartwright, John H. Garner, W. B. Ward, Chas. A. Dickey, E. E. Hogshead, R. A. Cody, T. N. Mosely, W. V. Tompkins, Royal Young Graham, Mervin J. Eckels, Robert M. Patterson, Louis F. Benson, John H. Lee, John B. Laird, Robert Hunter, William W. Allen, Thomas H. Synott, John H. Converse, George L. Gillum, John H. Watt, William H. Scott, Franklin L. Sheppard, R. N. Wilson, A. R. Perkins, Bernard Gilpin, Wm. Benton, Greene,

Samuel McLanahan, Frank Lukens, George Hale and Robert A. Hinckley, pray an appeal from the final decree of this court to the Supreme Court of the United States and assign for error:

First. That the court erred in holding that the defendant corporation, the Board of Publication of the Cumberland Presbyterian Church is not antagonistic to the complainants in this cause.

Second. That the court erred in holding that the absence of any showing of antagonism between the defendant corporation, the Board of Publication of the Cumberland Presbyterian Church and the complainants, said corporation is to be aligned upon the same side of the controversy with the complainants in this suit.

Third. That the court erred in holding that when the parties are properly aligned according to interest, the defendant corporation, the Board of Publication of the Cumberland Presbyterian Church, will be found on the same side of the controversy with the complainants.

Fourth. That the court erred in holding that this cause was not a controversy between citizens of different states and that the court did not have jurisdiction thereof.

Fifth. That the court erred in dismissing complainants' bill.

Whereas, complainants pray that the decree of the said circuit court be reversed.

ALEX. P. HUMPHREYS,
JNO. M. GAUT,
Attorneys for Complainants.

The following order allowing appeal was entered, viz:

No. 3590. Equity.

T. O. HELM et al.
vs.
J. H. ZARECOR et al.

This day came T. O. Helm, Thomas H. Cobbs, Thomas H. Perrin, W. T. Cartwright, John H. Garner, W. B. Ward, Chas. A. Dickey, E. E. Hogshead, R. A. Cody, T. N. Mosely, W. V. Tompkins, Royal Young Graham, Mervin J. Eckels, Robert M. Patterson, Louis F. Benson, John H. Lee, John B. Laird, Robert Hunter, William W. Allen, Thomas W. Synott, John H. Converse, George L. Gillum, John H. Watt, William H. Scott, Franklin L. Sheppard, R. N. Wildon, A. R. Perkins, Berbard Gilpin, Wm. Benton Greene, Samuel McLanahan, Frank Lukens, George Hale, and Robert A. Hinckley, being all the complainants in the above-styled cause and presented their petition for an appeal and an assignment of errors accompanying the same, which petition, upon consideration of the court is hereby allowed and the court allows an appeal to the United States Supreme Court upon the filing of a bond in the sum of five hundred dollars, with good and sufficient security to be approved by the clerk of this court.

Enter:

EDWARD T. SANFORD, *Judge.*

The following bond was filed, to-wit:

No. 3590. Equity.

T. O. HELM et al.
vs.
J. H. ZARECOR et al.

Know all men by these presents that we, T. O. Helm, Thomas H. Cobbs, Thomas H. Perrin, W. T. Cartwright, John H. Garner, W. B. Ward, Chas. A. Dickey, E. E. Hogshead, R. A. Cody, T. N. Mosely, W. V. Tompkins, Royal Young Graham, Mervin J. Eckels, Robert M. Patterson, Louis F. Benson, John H. Lee, John B. Laird, Robert Hunter, William W. Allen, Thomas W. Synott, John H. Converse, Geo. L. Gillum, John H. Watt, William H. Scott, Franklin L. Sheppard, R. N. Wilson, A. R. Perkins, Bernard Gilpin, Wm. Benton Greene, Samuel McLanahan, Frank Lukens, George Hale, and Robert A. Hinckley, complainants in the above-styled cause, as principals, and William E. Ward and W. W. Wilkerson, as sureties are held and firmly bound unto T. O. Helm et al. *et al.* defendants in the above-styled cause, in the full and just sum of five hundred dollars to be paid to the said J. H. Zarecor et al. *et al.*, their certain attorneys, executors, administrators, or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dates this 15 day of Feb'y, 1911.

Whereas lately at a circuit court of the United States for the Middle District of Tennessee, in a suit pending in said court between T. O. Helm et al. *et al.*, complainants and J. H. Zarecor et al. *et al.* defendants a decree was rendered against the said T. O. Helm et al. *et al.* and the said T. O. Helm et al. *et al.* whose names are hereinbefore fully set out, having obtained an appeal and filed a copy thereof in the clerk's office of the said court, to reverse the decree in the aforesaid suit and a citation directed to the said J. H. Zarecor et al., citing and admonishing them to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 15 day of March, 1911 next;

Now the condition of the above obligation is such that if the said T. O. Helm et al., shall prosecute their appeal to effect, or answer all damages and costs if they fail to make their plea good, then the above obligation to be void; otherwise to remain in full force and virtue.

T. O. HELM AND OTHER 32
APPELLANTS.
By JOHN M. GAUT, *Solr.*
WM. E. WARD, *Surety.*
W. W. WILKERSON, *Surety.*

Sealed and delivered in the presence of
H. M. DOAK, *Clerk.*

Approved:
H. M. DOAK, *Clerk.*

UNITED STATES OF AMERICA,
Middle District of Tennessee:

The Supreme Court of the United States of America to J. H. Zarecor, W. E. Dunnaway, S. A. Cunningham, W. L. Danley, J. H. Zwingle, J. H. Fussell, R. L. Baskette, A. N. Eshman, F. A. Seagle, and the Board of Publication of the Cumberland Presbyterian Church, defendants in a case No. 3590, of T. O. Helm et al. vs. J. H. Zarecor et al., Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States to be holden at the City of Washington on the 15 day of March next, pursuant to an appeal filed in the clerk's office of the Circuit Court of the United States for the Middle District of Tennessee, wherein T. O. Helm et al. are appellants and you are defendants to show cause, if any there be, why the decree rendered against the said appellants as in said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, chief Justice of the United States, this the 15 day of Feb'y, 1911, and of American independence the 135th year.

JOHN E. McCALL,
Judge Holding the District Court of the United States.

Service accepted this 4 day of Feb'y, 1911.

FRANK SLEMMONS,
Attorney for Defendants.

I, H. M. Doak, clerk of the Circuit Court of the United States for the Middle District of Tennessee, hereby certify that the foregoing is a true, perfect and complete copy of the foregoing papers in the record in the above-entitled cause. In witness whereof I have hereunto signed my name and affixed the seal of the court, at office at Nashville, Tennessee, this 20 day of Feb'y, 1911.

[Seal Circuit Court U. S., Middle District, Tenn.]

H. M. DOAK, *Clerk.*

[Endorsed:] No. 3590. T. O. Helm et al. vs. J. H. Zarecor et al. Transcript of Record. John M. Gaut, Nashville, Tenn.; Alex. P. Humphreys, Louisville, Ky., for appellants; W. C. Caldwell, Trenton, Tenn.; Frank Slemmons, Nashville, T., for Appellees. 696/22317.

[Endorsed:] File No. 22,317. Supreme Court U. S. October Term, 1910. Term No. 696. T. O. Helm et al., appellants, vs. J. H. Zarecor et al. Certified copies of papers on second appeal. Filed February 27, 1911.

IN THE

Supreme Court of the United States

T. O. HELM, ET AL.
Appellants

vs.

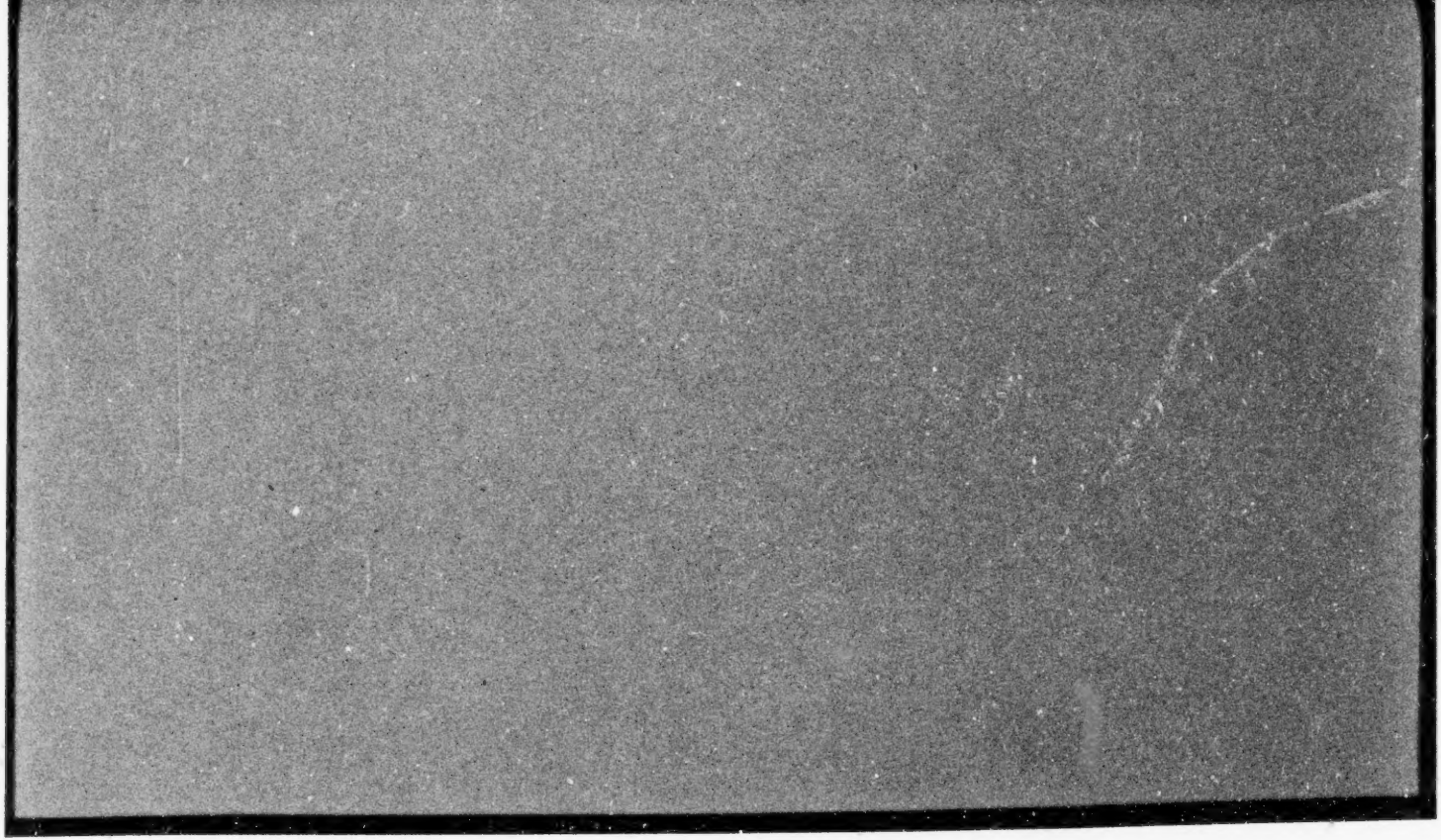
J. H. ZARECOR ET AL
Appellees

No. 395 October Term 1911

Appeal from the Circuit Court of the United States for the Middle District of Tennessee

MOTION TO ADVANCE AND BRIEF IN SUPPORT OF SAME

ALEX. P. HUMPHREY,
JOHN M. GAUT,
SOLICITORS FOR APPELLANTS



T. O. HELM et al,
Appellants,
vs.
J. H. ZARECOR et al,
Appellees.

No. 22317,
October Term, 1911, No. 395.

MOTION TO ADVANCE.

Now come the appellants in this cause and move the Court to advance the cause and hear the same, the case having been brought to this Court by appeal under the Act of Congress of March 3, 1891, Section 5, and the only question involved in the appeal being the question of the jurisdiction of the Court below.

As the basis of this motion, the appellants state the following facts as shown by the record:

Prior to the year 1810 there arose in Tennessee and Kentucky in the Presbyterian Church in the United States of America a difference as to the construction of the Confession of Faith of that church. This difference caused, in 1810, a secession from the church, and the persons leaving the church formed the Cumberland Presbyterian Church. Both churches grew in numbers.

In 1903 the Presbyterian Church in the United States of America consummated a revision of its Confession of Faith, in consequence of which both churches in that year came to the conclusion that the differences which had heretofore separated the two bodies no

longer existed, and therefore, steps were taken for a reunion. As the result of much negotiation, in 1906 the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church were consolidated into one body, styled the Presbyterian Church in the United States of America. This body has a membership of not far from a million and a half individuals, and has congregations and property interests practically over the whole of the United States.

A certain number of persons—clergymen and members of the Cumberland Presbyterian Church—opposed this reunion, and after it had been declared to be an accomplished fact by resolution of the General Assembly of the Presbyterian Church in the United States of America and by the General Assembly of the Cumberland Presbyterian Church, these dissatisfied persons, claiming to be the Cumberland Presbyterian Church, went on and formed an organization under that name. It was asserted by the consolidated body that the church property belonged to the consolidated body. It was asserted by the dissenters that the church property of the Cumberland Presbyterian Church had never passed to the consolidated body and remained with the dissenters.

These adverse claims resulted in litigation. The reunion has been declared to be valid and effectual by the courts of last resort in nine States of the Union, and invalid by the highest courts of two States.

Among other property belonging to the Cumberland Presbyterian Church was certain real estate and personal property, called the Nashville Publishing House. This

property was vested in a corporation which was created by the State of Tennessee March 22, 1860.

The purpose of the bill in this case is to have the Court declare that the proceedings taken to reunite the churches were valid and effectual for that purpose, and that this particular property belonged to the reunited church, and that the members of the reunited church were the stockholders or the *cestui que trustent* of the corporation. It was not the purpose of the bill to determine who were the directors of the corporation, but who were the stockholders, or who were the beneficiaries. This bill is found at page 1 of the record, and the amendment of it on page 90. To this bill as amended pleas to the jurisdiction of the Court were filed (R. 95). The Circuit Court overruled these pleas, but *mero motu* dismissed the bill for want of jurisdiction, and so certified (R. 208).

The bill shows that the complainants are members of an unincorporated voluntary religious association called the Presbyterian Church in the United States of America. They are all citizens of States other than Tennessee, and bring the bill of complaint on behalf of themselves and all other persons interested, viz: Members of the above-named voluntary religious association. The defendants are citizens of Tennessee. The individual defendants are alleged to be members of the Cumberland Presbyterian Church, a voluntary religious organization, and the corporate defendant is a corporation duly created by an Act of the Legislature of Tennessee, the name being "Board of Publication of the Cumberland Presbyterian Church." The individual defendants are sued as representing not only themselves, but all other persons simillarly situated and having a common interest.

The Court below held that in considering the question of jurisdiction the corporation should be aligned with the complainants, and as in this way there would be a citizen of Tennessee complainant and citizens of Tennessee defendants, the Court would be without jurisdiction such jurisdiction being predicated alone upon diversity of citizenship. The Court insisted upon this alignment, although, in fact, responsible counsel, in putting in pleas to the bill, appeared for and in the name of this corporation and united it with the individual defendants in the pleas.

The decree of the Court and certificate of the Judge (R. 207 and 208) are as follows:

> DECREE—Be it remembered that this cause came on to be heard upon the 28th day of March, 1910, as well as on former days, before the Hon. E. T. Sanford, Judge, etc., upon the motion of complainant to overrule the defendants' pleas heretofore filed in this cause, because the same are insufficient in law. And the Court, being of opinion that the said motion is well taken, orders, adjudges and decrees that the said pleas be and they are overruled, and the costs incident to filing the same will be paid by the defendants, for which let execution issue as at law.
>
> The Court being of the opinion that the effect of the pleas is not to place the defendant corporation, the Board of Publication of the Cumberland Presbyterian Church, which is sued in the bill, in antagonism to the complainants and defeat the necessary realignment of said corporation under the allegations of the bill, so as to place it on the

same side of the controversy with the complainants, and that since such realignment the diversity of citizenship necessary to give Federal jurisdiction is thereby destroyed, the Court, upon its own motion, therefore orders, adjudges and decrees that the bill be dismissed for want of jurisdiction, and the motion for a preliminary injunction and receivership is denied without consideration of the merits. The costs of the cause, except as above indicated, will be paid by the complainants, for which execution will issue as at law.

CERTIFICATE—In this cause I hereby certify that the judgment of dismissal herein made is based solely on the ground that the record does not show that the controversy involved is one, in my opinion, between citizens of different States, but that it appears from the record that one of the defendants, to wit: Board of Publication of the Cumberland Presbyterian Church, a corporation, is not antagonistic to the complainants, and that, therefore, it must be aligned upon the same side of the controversy with the complainants, and that, therefore, some of the defendants and one of the complainants are, in fact, citizens of the same State, and no other ground of jurisdiction appears from the record. The case is dismissed only for the reason above stated—that is, that the controversy is not between citizens of different States, and consequently the Circuit Court of the United States has no jurisdiction.

This certificate is made conformable to the Act

of Congress of March 3, 1891, Chapter 517, and the opinion filed herein is made a part of the record, and will be certified to and sent up as a part of the proceedings, together with this certificate.

Dated this 13th day of April, A. D. 1910.

EDWARD T. SANFORD,
United States District Judge, Holding the Circuit Court.

(Endorsed) Filed April 13, 1910
H. M. DOAK, *Clerk.*

Wherefore, appellants move the Court to advance the case to a speedy hearing on the question of jurisdiction, in order that, if the jurisdiction is sustained, the Lower Court may proceed to a hearing on the merits.

ALEX P. HUMPHREY,
JOHN M. GAUT,
Solicitors for Appellants.

APPELLANTS' BRIEF ON MOTION TO ADVANCE THE CASE.

There is little to be said on this motion. This Court, by making Rule 32, has already determined that the motion must be granted, provided the case is one to which the rule applies. The language of the rule is that the described class of cases "will be advanced on motion and heard," etc. The only question for this Court now to determine is whether this case belongs to the described class.

This question does not admit of controversy. The entire rule reads as follows:

> "Cases brought to this Court by writ of error or appeal, under the Act of February 25, 1889, Chapter 236, or under Section 5 of the Act of March 3, 1891, Chapter 517, where the only question in issue is the question of the jurisdiction of the court below, will be advanced on motion and heard under the rules prescribed by Rule 6, in regard to motions to dismiss writs of error and appeals."

The opinion of the Court (R. 207), the final decree (R. 207) and the certificate of the Judge of the Circuit Court (R. 208), all show that the Court, upon his own motion, dismissed the bill for want of jurisdiction.

> The Judge certified that "the opinion filed herein is made part of the record and will be certified to and sent up as part of the proceedings, together with this certificate." R. 208. Motion 6.

The opinion closes as follows:

> "An order will accordingly be entered overruling the defendants' plea as to the jurisdiction, but dismissing the bill by the Court on its own motion for want of jurisdiction, and, in consequence, denying the motions for preliminary injunction and receivership without consideration of the merits." R. 207.

The decree, after overruling the pleas,

> "adjudges and decrees that the bill be dismissed for want of jurisdiction, and the motion for

> a preliminary injunction and receivership is denied without consideration of the merits." R. 207; Motion 5.

The certificate certifies, among other things, that

> "the case is dismissed only for the reason above stated—that is, that the controversy is not between citizens of different States, and, consequently, the Circuit Court of the United States has no jurisdiction." R. 208; Motion 5.

The certificate further certifies that "this certificate is made conformable to the Act of Congress of March 3, 1891, Chapter 517." R. 208; Motion 5-6.

The Act of 1891, Chapter 517, provides that appeals and writs of error from the Circuit Courts

> "shall be had only in the Supreme Court of the United States or in the Circuit Courts of Appeals hereby established according to the provisions of this Act regulating the same."

Section 5 provides for appeals direct to the Supreme Court "in any case in which the jurisdiction of the court is in issue," etc.

This being a case brought to this Court by appeal under that Act, and the only question in issue being the question of the jurisdiction of the Court below, the case comes directly within the class provided for by Rule 32, and under that rule the motion must be sustained.

ALEX P. HUMPHREY,
JOHN M. GAUT,
Solicitors for Appellants.

IN THE SUPREME COURT OF THE UNITED STATES

No. 395 October Term 1911

T. O. HELM ET AL.
Appellants

vs.

J. H. ZARECOR ET AL.
Appellees

Appeal from the Circuit Court of the United States for the Middle Division of Tennessee.

Statement of Appellees on Motion of Appellants to Advance.

FRANK S. MOON,
W. R. LAMB,
W. C. CALDWELL,
Solicitors for Appellees.

No. 22317

T. O. HELMET et al.
Appellants
vs
J. H. ZORECOR et al.
Appellees

No. 395
October Term 1911

STATEMENT OF APPELLEES ON MOTION BY APPELLANTS TO ADVANCE.

The statement of appellees on the motion of appellants to advance this case is the same as that they will make on the hearing. It will be found to be different from the statement for appellants, which greatly narrows the scope and purposes of the bill.

This case involves the ownership and use, possession and management of the property, real and personal, of "The Board of Publication of the Cumberland Presbyterian Church."

There were two rival sets of individuals comprising ten persons each, W. A. Provine and his associates on one side, and J. H. Zarecor and his associates on the other side; and those of each set, respectively, claimed to be the only true and lawful members of the Board of Publication, and as such entitled to the exclusive possession and management of its property and business. Those of one set, Provine and his associates, had that possession and management when this bill was filed, and the primary object of the bill was to continue and protect them therein, and to restrain the other set, Zarecor and his associates, from interference therewith.

The bill was filed by certain ministers, ruling elders, and non-official members of the Presbyterian Church in the United States of America, citizens of Kentucky, Missouri, Illinois, Alabama, Arkansas, Texas, Mississippi, Pennsylvania and New Jersey, in their own right and in behalf of all other members of that Church, against the Board of Publication of the Cumberland Presbyterian Church, a Tennessee corporation, and J. H. Zarecor and his associates (excepting A. C. Biddle, a citizen of Kentucky) by name, and as representatives of all other members of the Cumberland Presbyterian Church, who are citizens of Tennessee. W. A. Provine and his associates (four of whom are citizens of Tennessee, one of Illinois, one of Georgia, one of Kentucky, one of Missouri, and one, recently deceased, of Texas), who are alleged to be in the rightful possession and management of the property and business, and whose continuance and protection therein is the chief purpose of the bill, though described, are not made parties; and A. C. Biddle, one of Zarecor's associates, a citizen of Kentucky, is not made a party.

The Presbyterian Church in the United States of America and the Cumberland Presbyterian Church are un-incorporated religious associations. The Board of Publication of the Cumberland Presbyterian Church was incorporated in the year 1860, under the laws of Tennessee, at the instance of and subject to the direction and control of the General Assembly of the Cumberland Presbyterian Church; and the property here in question was acquired for the use and benefit of that Church.

There were no shares of stock and no corporate directors in the technical sense.

The General Assembly of the Cumberland Presbyterian Church was to appoint and did appoint the members of the Board of Publication from time to time; and they possessed and managed the property and business of the corporation under the direction and control of the General Assembly.

W. A. Provine and his associates, persons so appointed and

so in the possession and management of the corporate property and business, on and prior to May 24th, 1906, assumed, from and after that date, to hold and manage that property and business not for the use and benefit of the Cumberland Presbyterian Church and subject to the direction and control of its General Assembly as formerly, but for the use and benefit of the Presbyterian Church in the United States of America and subject to the direction and control of the General Assembly of that Church; that assumption being made on account of an alleged union and reunion of the two Churches.

The General Assembly of the Cumberland Presbyterian Church, in May, 1907, appointed J. H. Zarecor and his associates members of the Board of Publication in the room and stead of W. A. Provine and his associates. Nevertheless the latter gentlemen refused to surrender the corporate property and business, and continued to hold and manage the same as last above stated. They were so holding and managing that property and business when this bill was filed, to continue and protect them therein as aforesaid; but they were not made parties.

In December, 1907, the State of Tennessee filed a bill, under a statute of the State, in the Chancery Court at Nashville, Tennessee, in the nature of a *quo warranto* proceeding, on the relation of the said J. H. Zarecor and his associates, to have the relators installed in the room and stead of the said W. A. Provine and his associates as members of the Board of Publication of the Cumberland Presbyterian Church, and to have the relators placed in the possession and management of the corporate property and business, for the use and benefit of the Cumberland Presbyterian Church. That bill was pending when the present bill was filed, though no mention of it is made in this bill.

As early as July, 1906, certain resident and non-resident ministers, ruling elders and non-official members of the Presbyterian Church in the United States of America filed a bill in the Chancery Court at Fayetteville, Tennessee, against proper par-

ties, seeking to establish the validity of the said alleged union and reunion, by virtue of which alone members of that Church could in that bill or in this one claim any interest in any of the property of the Cumberland Presbyterian Church, whether a local house of worship as in that instance, or the Publishing House property as in this instance. In that case the Supreme Court of Tennessee, on the third day of April, 1909, adjudged the alleged plan of union and reunion to be invalid. The present bill was filed just twelve days later, April 15th, 1909; and, though the relief sought here is based upon the alleged validity of the plan there decided to be invalid, this bill does not mention that one or the decision thereunder.

Diversity of citizenship is the only ground of Federal Jurisdiction alleged in this bill. Pleas to the jurisdiction were overruled, and the presiding judge, on his own motion, under Sec. 5, Ch. 137 of the Judiciary Act, of 1875, aligned the corporate defendant with the complainants and thereupon dismissed the bill for want of jurisdiction. R. 207.

The complainants have appealed and assigned errors.

The appellees, J. H. Zarecor and his associates, respectfully ask that the judgment of dismissal be affirmed.

The statement for appellants in support of their motion to advance, on page 4, is inaccurate in that it recites that the court below "insisted" on aligning the corporate defendant with the complainants, though it in fact had been united with the personal defendants in pleas filed by them. The court below found and held that those pleas were not the pleas of the corporation, but only the pleas of the personal defendants, though its name appeared in the introduction of the pleas. R. 206.

Appellees have no objection to offer to the advancement and early hearing of the case. Respectfully submitted,

FRANK SLEMONS,
W. B. LAMB,
W. C. CALDWELL,
Solicitors for Appellees.

IN THE SUPREME COURT OF THE UNITED STATES

T. O. HELM ET AL.
Appellants

vs.

J. H. ZARECOR ET AL
Appellees

No. 395 October Term 1911

Appeal from the Circuit Court of the United States for the Middle District of Tennessee

---

ALEX. P. HUMPHREY,
JOHN M. GAUT,
SOLICITORS FOR APPELLANTS.

Supreme Court of the United States

OCTOBER TERM, 1911

No. 395

Brief for Appellants

T. O. HELM,
THOMAS M. COBBS and
THOMAS H. PERRIN,
Appellants.

J. H. ZARECOR, et al,
Appellees.

STATEMENT.

The original bill will be found at page 1. The amended bill at page 90. To this bill as amended certain pleas were filed. (R., 95.) The court overruled these pleas, but held that the case was one of which the United States Circuit Court had no jurisdiction. (Opinion, R., 202 to 207.) It accordingly dismissed the bill for want of jurisdiction and made the ordinary certificate. (R., 208.) The bill was filed in the Circuit Court of the United States for the Sixth Circuit and Middle District of Tennessee. Briefly stated the bill as amended makes the following case:

The complainants are members of an unincorporated voluntary religious association called the Presbyterian Church in the United States of America. They are all citizens of States other than Tennessee, and bring the bill of complaint on behalf of themselves and all other persons interested, viz., members of the above named voluntary religious association.

The defendants are citizens of Tennessee. The individual defendants are alleged to be members of the Cumberland Presbyterian Church, a voluntary religious organization; and the corporate defendant is a corporation duly created by an act of the legislature of Tennessee, the name being "Board of Publication of the Cumberland Presbyterian Church."

The individual defendants are sued as representing not only themselves but all other persons similarly situated and having a common interest.

The court below held that in considering the question of jurisdiction the corporation should be aligned with the complainants, and as in this way there would be a citizen of Tennessee complainant, and citizens of Tennessee defendants, the court would be without jurisdiction, such jurisdiction being predicated alone upon diversity of citizenship. The court insisted upon this alignment, although in fact responsible counsel, in putting in pleas to the bill, appeared for and in the name of this corporation and united it with the individual defendants in the pleas. So that here we have a case where a corporation has made a defense and counsel representing the other defendants has appeared for it and united it in a plea to the bill, yet the court. on its own motion, aligns this corporation with the complainants, and so doing, makes necessary the dismissal of the bill for the want of jurisdiction.

A brief statement of the occasion for this litigation will suffice.

In the year 1810 there was a secession from the Presbyterian Church in the United States of America, and the persons leaving the church formed the Cumberland Presbyterian Church. Both churches grew in numbers. About the year 1903 both churches came to the conclusion that the differences which had heretofore separated the two bodies no longer existed, and therefore steps were taken for a re-union. The constitution of both of these voluntary religious societies was the same; that is, in each there was a session composed of ruling elders and a pastor, governing the individual church; a body over them called a presbytery, composed of ministers and selected elders from each church within a prescribed boundary;

another body over that, a synod, composed of clergymen and selected members from the churches in a boundary that embraced a number of presbyteries; and over that the General Assembly, composed of persons selected by the presbyteries—clergymen and ruling elders. Each of these judicatories has a certain legislative as well as judicial character.

As the result of much negotiation in 1906 the Presbyterian Church in the United States of America and the Cumberland Presbyterian Church were consolidated into one body, styled the Presbyterian Church in the United States of America. This body has a membership of not far from a million and a half individuals, and has congregations and property interests practically over the whole of the United States.

A certain number of persons—clergymen and members of the Cumberland Presbyterian Church—opposed this reunion, and after it had been declared to be an accomplished fact by resolution of the General Assembly of the Presbyterian Church in the United States of America, and by the General Assembly of the Cumberland Presbyterian Church, these dissatisfied persons, claiming to be the Cumberland Presbyterian Church, went on and formed or continued in an organization under that name. It was asserted by the consolidated body that the church property belonged to the consolidated body. It was asserted by the dissenters that the church property of the Cumberland Presbyterian Church had never passed to the consolidated body and remained with the dissenters.

These adverse claims resulted in litigation. The reunion has been declared to be valid and effectual in Mack

v. Kime, 129 Ga., 1, 58 S. E., 184; Permanent Committee of Missions v. Pacific Synod (Cal.), 106 Pac. Rep., 395; Ramsey v. Hicks (Ind.), 91 N. E., 344; First Presbyterian Church v. First Cumberland Presbyterian Church (Ill.), 91 N. E., 761; Wallace v. Hughes (Ky.), 115 S. W., 684; Brown v. Clark, 102 Tex., 324, 116 S. W., 364; Sanders v. Baggerly (Ark.), 131 S. W., 49, and Harris v. Cosby, — Ala., — —, 55 Southern Rep., 231; and Carothers v. Moseley (Miss.), not yet reported. It, however, has been declared invalid in the highest court of two States: Landrith v. Hudgins, 121 Tenn., 556, 120 S. W., 783, and Boyles v. Roberts (Mo.), 121 S. W., 805.

Among other property belonging to the Cumberland Presbyterian Church was certain real estate and personal property, called the Nashville Publishing House. This property was vested in a corporation which was created by the State of Tennessee, March 22, 1860. The charter of this corporation is printed as an appendix to this brief.

The property of this corporation is of the value of about $200,000. One of the first acts of the dissenters was to remove the Board of Directors of this corporation and to appoint others in their place. It appears by the pleas that the persons thus named by the dissenters, through the Attorney-General of Tennessee, instituted quo warranto proceedings in the Chancery Court at Nashville, the purpose of which was to oust the old Board and to install the new. That proceeding was pending at the time the bill in this case was filed. The purpose of the bill was to have the court declare that the proceedings taken to reunite the churches was valid and effectual for

that purpose, and that this particular property belonged to the reunited church, and that the members of the reunited church were the stockholders or the *cestui que trustent* of the corporation. It was not the purpose of the bill to determine who were the directors of the corporation, but who were the stockholders, or who were the beneficiaries.

As stated above, the learned court held that the Tennessee corporation should be aligned with the complainants, and therefore that the bill should be dismissed for want of jurisdiction.

ASSIGNMENT OF ERRORS.

The following is the assignment of errors:

First.—That the court erred in holding that the defendant corporation, the Board of Publication of the Cumberland Presbyterian Church, is not antagonistic to the complainants in this cause.

Second.—That the court erred in holding that, in the absence of any showing of antagonism between the defendant corporation, the Board of Publication of the Cumberland Presbyterian Church, and the complainants, said corporation is to be aligned upon the same side of the controversy with the complainants in this suit.

Third.—That the court erred in holding that when the parties are properly aligned according to interest, the defendant corporation, the Board of Publication of the Cumberland Presbyterian Church, will be found on the same side of the controversy with the complainants.

Fourth.—That the court erred in holding that this cause was not a controversy between citizens of different States, and that the court did not have jurisdiction thereof.

Fifth.—That the court erred in dismissing complainant's bill.

It should perhaps be explained that through some mistake the appeal taken in this case originally was taken by those persons who were complainants in the original bill only. The amended bill added many complainants. When this mistake was discovered a new and independent appeal was taken by all of the complainants as they appear in the amended bill, against all of the defendants as they appear in the amended bill, a new bond being executed and new citation issued and served.

ARGUMENT.

The bill is one of a character that has been often recognized by courts dealing with equitable procedure. It is a bill filed by a few of very many persons having a common interest, with the purpose of determining whether the complainants and those associated with them in interest, or the defendants and those associated wih them in interest, are the true beneficiaries of property the title to which is in the name of a third person made defendant to the bill so that the court can determine and declare by its decree whether the third person holds the property to which it has the legal title in trust for the one large body of persons or the other large body of persons.

There are two characteristics of such a suit:

1. No person is a party to such a suit who is not named as a party on the record.

2. Notwithstanding that persons belonging to the class represented by the complainant, and persons belonging to the class represented by the defendant are not parties, yet they are all bound by the decree.

It is obvious that in order that such a representative suit shall be allowed to dispense with the naming of all persons interested upon the one hand, and yet bind all persons interested, upon the other, great care should be taken to see that persons are chosen on both sides who will fairly represent and take care of the interests of the class to which they belong. Hence in selecting persons as complainants there have been singled out some who were

members of the Presbyterian Church of the United States of America prior to the reunion; some who were members of the Cumberland Presbyterian Church prior to the reunion; and certain persons to whose special care is entrusted, by the united church, its interests in education and publication. Of course, in electing these persons the pleader purposely omitted to choose any one who was a citizen of the State of Tennessee. On the other hand, in selecting representative defendants, the pleader chose persons who had refused to consider the reunion as valid, and who were now claiming to be members of the Cumberland Presbyterian Church as an independent body, and who were claiming to be the persons chosen by that body as the directors in the Tennessee corporation—not that they were made defendants as such directors, but they were chosen because they were directors and for that reason would be sure to represent faithfully the class of which they were members.

It happened that one citizen of Kentucky had been chosen as a member of the Board of Directors of this Tennessee Publishing Company, by the Cumberland Presbyterian Church. He was omitted as a defendant.

The plea herein charged that these complainants and defendants were selected in this way by collusion and with a view of bringing this case within the jurisdiction of the Federal Court, whereas if the pleader had selected, as he might have done, persons living in Tennessee who were members of the united church, or persons living outside of Tennessee who were of the same citizenship with the complainants and yet members of the present Cum-

berland Presbyterian Church, he would have ousted the court of its judisdiction.

This is a matter upon which there can be no cavil. Obviously in determining the selection of representative complainants and representative defendants the pleader did so with the view of giving the court jurisdiction. Had the pleader pursued a different plan it would have been nothing less than foolish.

As stated above, in cases of this kind, viz., where the complainants sue in a representative capacity as belonging to a class, members of that class who are not named as parties on the record are not parties to the suit.

Thus in Stewart v. Denham, 115 U. S., 64, certain creditors filed a general creditors' bill on behalf of themselves and all other creditors, to set aside a fraudulent conveyance executed by their common debtor. This case was removed to the United States Court. After its removal certain creditors belonging to the same class as the original complainants and who were citizens of the State in which the suit was brought, intervened and had themselves made co-complainants. The court held that the case was removable when it was removed, and the subsequent intervention did not deprive the court of its jurisdiction. In order to hold that the case was removable the court was compelled to hold that the creditors who intervened were not parties to the suit as originally brought; otherwise the controversy would not have been wholly between citizens of different States.

In such a suit, however, all persons belonging to the class of which the complainants or the defendants are members are concluded by the decree.

The leading case on this subject is Smith v. Swormstedt et al., 16 How., 288, a case very much like the one at bar. The controversy there grew out of a division of the Methodist Episcopal Church. This division resulted in the formation of two voluntary unincorporated societies—one, the Methodist Episcopal Church, and the other the Methodist Episcopal Church, South. The original church had a certain fund which was used for the support of supernumerary and superannuated preachers. The case involved the distribution of this fund.

The complainants were, some of them, commissioners appointed by the Methodist Episcopal Church, South, to demand a proportion of the fund sued for, and certain supernumerary and superannuated preachers belonging to the traveling connection of the Church, South. All of the complainants were citizens of States other than Ohio. The defendants were two persons, agents of the Book Concern in Cincinnati, and a third person who, as well as the two agents, was a traveling preacher of the Methodist Episcopal Church, all these being citizens of Ohio; the Methodist Book Concern, a corporation of Ohio, and two persons, citizens of the State of New York.

In this case the court considered carefully the question of jurisdiction in such a proceeding.

> "The rule is well established," said the court, "that where the parties interested are numerous and the suit is for an object common to them all, some of the body may maintain a bill on behalf of themselves and of the others, and a bill may also be maintained against a portion of a numerous

body of defendants representing a common interest."

Again the court said:

"The case in hand illustrates the propriety and fitness of the rule. There are some 1,500 persons represented by the complainants, and over double that number by the defendants. It is manifest that to require all the parties to be brought into the record, as is required in a suit at law, would amount to a denial of justice."

Again the court said:

"In all cases where exceptions to the general rule are allowed and the few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried."

In this case, as in the case at bar, the corporation which held the fund was made a party defendant. There does not seem, however, to have been any idea that this corporation should be aligned with the complainants rather than with the defendants.

We might cite many cases treating of the rule as to parties, laid down in the opinion of this court in the case above cited.

In United States v. Old Settlers, 148 U. S., 480, this court repeats the caution as to selection of parties. Exam-

ples of suits by representatives either as complainants or defendants, or both, are found in American Steel Company v. Wire Drawers Company, 90 F. R., 606; McIntosh v. City of Pittsburg, 112 F. R., 707; Watson v. New York Life Insurance Company, 162 F. R., 11; San Francisco Gas Company v. City of San Francisco, 164 F. R., 886.

It is impossible to suppose that in any of these cases there were not some members of the represented class who, if made parties on the record, would have defeated the jurisdiction.

Another case which seems to us to be directly in point is that of Watson v. Jones, 13 Wall., 679. That case grew out of a division of the Synod of Kentucky of the Presbyterian Church of the United States of America. A certain proceeding had been taken in the State courts to determine who were the lawfully elected elders (and hence the governing body) of the Walnut Street Church of Louisvile, Ky., resulting in a decision in favor of what we may call the Southern church. Thereupon a bill was filed in the Circuit Court of the United States for the District of Kentucky by certain persons who alleged that they were citizens of Indiana and members of the Walnut Street Church. They made parties defendant the elders, the church corporation and certain persons who had been elected as trustees of the church. Their prayer for relief was that it should be declared that the property of the church should be managed for the use and benefit of themselves and other members of the congregation adhering to the Northern church. The defendants, trustees, answered, admitting the allegations of the bill and stating

that though requested, they had refused to prosecute legal proceedings in the matter because, as they thought, any effort to that end in the courts of the State of Kentucky would be useless. The result of the case was to grant the relief prayed for, the Circuit Court holding, and this court agreeing therewith, that the question involved in the State court suit was simply who were the elders of the church; whereas the question involved in the instant suit was, for whose benefit should the property of the church be held and managed? There was no suggestion in this case that the corporation should be aligned with the complainant any more than with the defendant. Indeed, on which side the corporation should be was there, as it is here, the very matter in issue.

Taking these two cases together, it would seem that they should be conclusive of the one at bar.

On what principle the corporation was held to be allied with the complainants we find it difficult to understand. The learned court seemed to have a notion that there were two corporations, one of which was friendly to the defendants. (R., 206.) The court speaks of certain persons composing a corporation, which is friendly to the complainants; and other persons composing another corporation which is friendly to the defendants. But there is but one corporation.

It is true there was a board which was elected to conduct the affairs of the corporation, and that this board was subject "to the regulation and control of the General Assembly of said church under its past and future action on that subject; the number of the board may be in-

creased or diminished, and all vacancies filled as the said authority has or may direct." But the question here is not who are the rightful members of the board but who are the rightful beneficiaries of the trust? In other words, this is not a suit by one set of directors claiming to be the rightful directors, to enjoin other persons asserting title to a similar office, but it is a suit by, stockholders or *cestui que trustent* to declare that they are the rightful stockholders or *cestui que trustent*. The corporation is made a party because the corporation has title to the property. But the interest of the corporation is one thing and the interest of the sockholders or *cestui que trustent* (whatever they may be called in such a case as this) is an entirely different thing.

Many cases have come to this court in which a stockholder has brought suit against a corporation and third persons, claiming that the corporation had a right of action against such third person but was refusing to assert it, and that the complainant, under the circumstances of the case, could come into court and assert a right in favor of the corporation and against its co-defendants which the corporation was refusing to assert. In many of these cases the corporation and the other defendants have been citizens of the same State, and yet this court has maintained jurisdiction and granted relief. In all of these cases, if the allegations of fact in the complainant's bill were true, it has been to the interest of the corporation that the complainant should succeed. Therefore the corporation, if its interest only were to be taken into consideration, must have been aligned with the complainant and not with the defendant.

We might mention a host of such cases, but a few of them will be sufficient. One of the latest is Delaware & Hudson Co. v. Albany & Susquehanna, 213 U. S., 436, where the court below maintained jurisdiction of a suit brought by a stockholder of the Susquehanna Company to require the Delaware Company to account to the Susquehanna Company for certain rentals, and to pay to the Susquehanna Company the sum of $1,100,000. But as both companies were under the domination of the same board of directors, this court held that the suit was well brought in the Federal Court, although both corporations—the debtor and creditor—were citizens of the same State.

Another case of the same kind is Venner v. Great Northern Railway Co., 209 U. S., 25. Here it was alleged that the individual defendant had, in violation of his trust, sold to the corporate defendant stock at a profit to himself of $10,000,000. The individual defendant and the corporate defendant were both citizens of the same State.

In this case, as well as in the case last cited, both defendants resisted the relief sought by the complainant; that is, in the Delaware case both defendants demurred, and in the Venner case both defendants opposed the complainant's contention.

The court, in Doctor v. Harrington, 196 U. S., 579, refused to align the corporation defendant with the complainant.

In all of these cases the Federal jurisdiction was dependent alone upon diversity of citizenship, and if in any of these cases the corporation in which complainants were

interested had been aligned with the complainant it would have ousted the jurisdiction of the court.

In the case at bar responsible counsel have assumed to represent the corporation and have joined the corporation with the other defendants in resisting the claim of the complainants.

Suppose the complainants had taken a rule upon these counsel to show by what authority they used the name of the corporation or assumed to enter its appearance and represent it in this litigation—it is obvious that the counsel would have responded that there was a certain board of directors of this corporation, appointed by the Cumberland Presbyterian Church, and that this board had authorized counsel to represent the corporation. Surely in such a proceeding as that the court below would not have tried out the case. To do so would have required it to go into the whole of the merits.

Suppose that this were an ordinary corporation and that certain persons claiming to be stockholders were to file a bill against the corporation and other persons claiming to be stockholders, alleging that the complainants were stockholders rightfully and that the defendants were not stockholders at all, and asking that the corporation be enjoined from paying any dividends to the defendants or from allowing the defendants to participate in stockholders' meetings, and an injunction against the other defendants to the same effect—we submit that in such a case for the court to align the corporation with the complainants would be simply to assume that the complainants were right and the individual defendants were wrong.

In the case at bar the question sought to be litigated is whether the members of the voluntary society called the Presbyterian Church in the United States of America, or the members of the voluntary society called the Cumberland Presbyterian Church have the right to control the affairs of the defendant corporation. Considering the matter now before the court, which is solely one of jurisdiction, there is no other question to be solved.

We respectfully submit that the suit was rightfully brought and that the court below had jurisdiction, and that there was no legal propriety in aligning the corporate defendant with the individual complainants.

ALEX. P. HUMPHREY,
JOHN M. GAUT,
Solicitors for Appellants.

APPENDIX.

CHARTER OF THE BOARD OF PUBLICATION OF THE CUMBERLAND PREBYTERIAN CHURCH.

SEC. 34. BE IT FURTHER ENACTED, That Wiley M. Reed, William E. Ward, and Andrew Allison, now constituting the Committee of Publication of the Cumberland Presbyterian Church, under the appointment of the General Assembly, be, and they are hereby, constituted a body corporate and politic under the name and style of "The Board of Publication of the Cumberland Presby-

terian Church," and as such it shall have power to own property, to make contracts, to sue and be sued, and to have and enjoy such other powers and be subject to such liabilities as are incident to corporate bodies by the general laws of the land; said Board shall be subject to the regulation and control of the General Assembly of said Church under its past and future action on the subject; the number of the Board may be increased or diminished, and all vacancies filled as the said authority has or may direct; the General Assembly of the Church shall also have power to locate the Board and change the same at pleasure; and also at any time to alter the name of said corporation or dissolve the same, but not so as to prejudice the rights of others.

SEC. 35. BE IT ENACTED, That no donation by will or otherwise, nor any conveyance to said Board, shall fail because of any mistake as to the name of the corporation, provided the intention is manifest; and all donations clearly intended for the cause of publication in the said Church shall inure to the said Board, although they may be made to any other society or organization of the said Church whether incorporated or not.

IN THE SUPREME COURT OF THE UNITED STATES

No. 395, October Term, 1911

T. O. HELM ET AL
Appellants

vs

J. H. ZARECOR ET AL
Appellees

Appeal from the Circuit Court of the United States for the Middle District of Tennessee

---

Brief for Appellees

FRANK SLEMONS,
W. B. LAMB,
W. C. CALDWELL,
Solicitors for Appellees.

In the Supreme Court of the United States

No. 395

OCTOBER TERM, 1911

T. O. HELM et al,
Appellants

vs

J. H. ZARECOR et al,
Appellees

Brief for Appellees

FRANK SLEMONS,
W. B. LAMB,
W. C. CALDWELL,
Solicitors for Appellees.

STATEMENT.

This case involves the ownership and use, possession and management of the property, real and personal, of "The Board of Publication of the Cumberland Presbyterian Church."

There were two rival sets of individuals comprising ten persons each, W. A. Provine and his associates on one side, and J. H. Zarecor and his associates on the other side; and those of each set, respectively, claimed to be the only true and lawful members of the Board of Publication, and as such entitled to the exclusive possession and management of its property and business. Those of one set, Provine and his associates, had that possession and management when this bill was filed, and the primary object of the bill was to continue and protect them therein, and to restrain the other set, Zarecor and his associates, from interference therewith.

The bill was filed by certain ministers, ruling elders, and non-official members of the Presbyterian Church in the United States of America, citizens of Kentucky, Missouri, Illinois, Alabama, Arkansas, Texas, Mississippi, Pennsylvania and New Jersey, in their own right and in behalf of all other members of that Church, against the Board of Publication of the Cumberland Presbyterian Church, a Tennessee corporation, and J. H. Zarecor and his associates (excepting A. C. Biddle, a citizen of Kentucky) by name, and as representatives of all other members of the Cumberland Presbyterian Church, who are citizens of Tennessee. W. A. Provine and his associates (four of whom are citizens of Tennessee, one of Illinois, one of Georgia, one of Kentucky, one of Missouri, and one, recently deceased, of Texas), who are alleged to be in the rightful possession and management of the property and business, and whose continuance and protection therein is the chief purpose of the bill, though described, are not

made parties; and A. C. Biddle, one of Zarecor's associates, a citizen of Kentucky, is not made a party.

The Presbyterian Church in the United States of America and the Cumberland Presbyterian Church are un-incorporated religious associations. The Board of Publication of the Cumberland Presbyterian Church was incorporated in the year 1860, under the laws of Tennessee, at the instance of and subject to the direction and control of the General Assembly of the Cumberland Presbyterian Church; and the property here in question was acquired for the use and benefit of that Church.

There were no shares of stock and no corporate directors in the technical sense.

The General Assembly of the Cumberland Presbyterian Church was to appoint and did appoint the members of the Board of Publication from time to time; and they possessed and managed the property and business of the corporation under the direction and control of the General Assembly.

W. A. Provine and his associates, persons so appointed and so in the possession and management of the corporate property and business, on and prior to May 24th, 1906, assumed, from and after that date, to hold and manage that property and business not for the use and benefit of the Cumberland Presbyterian Church and subject to the direction and control of its General Assembly as formerly, but for the use and benefit of the Presbyterian Church in the United States of America and subject to the direction and control of the General Assembly of that Church; that assumption being made on account of an alleged union and reunion of the two Churches.

The General Assembly of the Cumberland Presbyterian Church, in May, 1907, appointed J. H. Zarecor and his associates members of the Board of Publication in the room and stead of W. A. Provine and his associates. Nevertheless the latter gentlemen refused to surrender the corporate property and business,

and continued to hold and manage the same as last above stated. They were so holding and managing that property and business when this bill was filed, to continue and protect them therein as aforesaid; but they were not made parties.

In December, 1907, the State of Tennessee filed a bill, under a statute of the State, in the Chancery Court at Nashville, Tennessee, in the nature of a *quo warranto* proceeding, on the relation of the said J. H. Zarecor and his associates, to have the relators installed in the room and stead of the said W. A. Provine and his associates as members of the Board of Publication of the Cumberland Presbyterian Church, and to have the relators placed in the possession and management of the corporate property and business, for the use and benefit of the Cumberland Presbyterian Church. That bill was pending when the present bill was filed, though no mention of it is made in this bill.

As early as July, 1906, certain resident and non-resident ministers, ruling elders and non-official members of the Presbyterian Church in the United States of America filed a bill in the Chancery Court at Fayetteville, Tennessee, against proper parties, seeking to establish the validity of the said alleged union and reunion, by virtue of which alone members of that Church could in that bill or in this one claim any interest in any of the property of the Cumberland Presbyterian Church, whether a local house of worship as in that instance, or the Publishing House property as in this instance. In that case the Supreme Court of Tennessee, on the third day of April, 1909, adjudged the alleged plan of union and reunion to be invalid. The present bill was filed just twelve days later, April 15th, 1909; and, though the relief sought here is based upon the alleged validity of the plan there decided to be invalid, this bill does not mention that one or the decision thereunder.

Diversity of citizenship is the only ground of Federal Jurisdiction alleged in this bill. Pleas to the jurisdiction were over-

ruled, and the presiding judge, on his own motion, under Sec. 5, Ch. 137 of the Judiciary Act, of 1875, aligned the corporate defendant with the complainants and thereupon dismissed the bill for want of jurisdiction. R. 207.

The complainants have appealed and assigned errors.

The appellees, J. H. Zarecor and his associates, respectfully ask that the judgment of dismissal be affirmed.

ARGUMENT.

The errors assigned, though five in number, present only the single contention that the court below erred in holding that the defendant corporation, the Board of Publication of the Cumberland Presbyterian Church, a citizen of Tennessee, should be aligned with the complainants.

It is not denied, and could not be successfully, that upon such alignment of parties the jurisdiction must fail for want of the requisite diversity of citizenship, and that a dismissal of the bill would follow inevitably.

The bill itself, which was the proper criterion at that stage of the case, justifies the action of the court. The complainants allege no controversy between themselves and the Board of Publication, nor do they seek any relief against it. As said by the court in Dawson vs. Columbia Trust Company, 197 U. S. 181, "No difference or collision of interest or action is alleged or even suggested." On the contrary the complainants clearly disclose a purpose on the part of themselves and of the corporation alike to continue and protect certain unnamed persons, W. A. Provine and his associates, in the possession and management of the corporate property and business, for the use and benefit of the Presbyterian Church in the United States of America, of which the complainants are members and of which they allege the corporation has believed and still believes itself

to be "a corporation and institution," and to prevent interference therewith by the other defendants, J. H. Zarecor and his associates.

Failure on the part of complainants to pray for relief against the corporation is significant and of itself shows that the corporation should be treated as a complainant in the case. Steele vs. Culver, 211 U. S. 29.

In substance and effect, the suit is one brought by and in the interest of some of the alleged beneficiaries of trust property, and in the interest of the corporate defendant, whose title and business are alleged to have become clouded and embarrassed and to be still further endangered by the claims of the personal defendants, J. H. Zarecor and his associates, whom the bill calls "supposed members of the Board of Publication," and also in the interest of certain described but unnamed persons, W. A. Provine and his associates, whose possession and management of the corporate property and business are alleged to be rightful and are sought to be continued and protected against the claims of the said Zarecor and his associates.

Some of the allegations of the bill are:

> "The Board and its officers and managers were advised and believed and still believe that said union had been legally formed and that thereby the Board of Publication became a corporation and institution of the reunited Church. . . . Said supposed members of the Board of Publication of the Cumberland Presbyterian Church have demanded of the officers and members of said Board the possession of all of the corporate property. They are claiming that they are the true and legal members of said Board and have a right to manage the corporation; that the title to and possession of the Publishing House and its contents and other assets of the corporation, which are now worth about $200,000.00 or more, are held by said corporation for the use and benefit of the religious organization whose General Assembly appointed them and by which they are recognized. They further claim that said General Assembly has the right to direct them in

the management of said corporation. This claim naturally creates a doubt in the minds of the public, and especially in the minds of those with whom the corporation has business relations, as to which is the organization whose members are the beneficiaries of the trust of which the corporation is the trustee, and which set of members is entitled to manage the corporation. This doubt has already to some extent affected the credit of the institution and will do so more and more as the contention grows more intensified, which it is bound to do. A cloud is thus cast upon the equitable title to the property and it is important that it should be removed and the possession and title of the present managers of the corporation be quieted by a decree of a Court of Equity of competent jurisdiction. It is also important that the defendants herein be enjoined from taking possession of said property or attempting to take possession of the same or in any way attempting to divert the property from the purposes of the trust, said trust being that the property shall be held for the use and benefit of the said reunited Church." R. 3, 4, and 5.

A part of the prayer of the bill is:

"That upon final hearing the court decree that the property in question is held in trust by the corporation for the use and benefit of the reunited Church, viz.: the Presbyterian Church in the United States of America, or the members thereof; that the members of said Board and their successors in office who may be elected by or in behalf of the said reunited Church in pursuance of the charter of the corporation, are the true and lawful members of the said Board; that said defendants be enjoined from taking possession or attempting to take possession of any of the property of said corporation or interfering in any manner with the possession, control or management of said corporation by its true and lawful members, or with their administration of the corporation and of said trust." R. 16 and 17.

It must be manifest to the court from the mere reading of this portion of the bill, that the corporation is really on the same side of he controversy with the complainants. That is clearly indicated by the brief allegation at the beginning of our quotation above, viz.:

"The Board and its officers and managers (being the corporation and Provine and his associates) were advised and believed and still believe that the said union had been legally formed and that thereby the Board of Publication became a coporation and institution of the reunited Church," (R. 3), of which complainants are ministers and ruling elders and non-official members.

Judge Sanford in his memorandum opinion said, in part:

"Independently, however, of the facts alleged in the pleas to the jurisdiction and of the several grounds thereof, I am of the opinion that under the provision of Section 5 of the Judiciary Act of 1875, providing, 'that if, in any suit commenced in a Circuit Court, . . . it shall appear to the satisfaction of the Court at any time after such suit has been brought . . . that it does not really and substantially involve a dispute or controversy properly within the jurisdiction of the Circuit Court . . . the said Circuit Court shall proceed no further therein, but shall dismiss the suit,' it becomes the duty of the court to dismiss this suit for want of jurisdiction, for the reason that it appears to my satisfaction after careful consideration of the bill, that when the parties are properly aligned the controversy is not really and substantially one between citizens of different States of which the court has jurisdiction. Nashua R. R. Co. vs. Lowell R. R. Co., 136 U. S. 356, 373.

I think it clear that under the authorities cited in Stephens vs. Smart and Finley vs. Williams, supra, and in accordance with the conclusion stated in the opinion in the case of Sharp vs. Bonham, that the defendant Board of Publication of the Cumberland Presbyterian Church, which is alleged to be a Tennessee corporation, is a necessary party in a suit such as the present, having as an essential object the obtaining of a decree that the property of such corporation is held by it in trust for the use and benefit of the reunited Church with which the complainants are identified; and that if not an indispensable party, it is at least a proper party which will be affected by a decree declaring the use for which it holds the property in trust, and necessarily imposing on it the duty of holding its property for such Church and no other; that in the absence of any showing of antagonism between this corporation and the complainants it is to be aligned upon the same side of the controversy with the complainants in this suit; that no showing of such antagonism is

made in the bill, it being, on the contrary, avered in the bill that said Board and its officers and members believe that the union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America has been legally formed and that thereby the Board of Publication became a corporation and institution of the reunited Church, and that its managers could do nothing else than report to the General Assembly of the reunited Church and otherwise recognize its authority, and the specific prayer of the bill being that the members of said Board be decreed to be the true and lawful members of said Board, and that the individual defendants, claiming to constitute such Board and described in the bill as 'supposed members of the Board,' be enjoined from taking possession of the property of the corporation or interfering with the possession, management or control of said corporation by its true and lawful members, or with their administration of the corporation and of said trust. That such realignment of the defendant corporation on the same side of the controversy with the complainants is not prevented by reason merely of the fact that, for some reason not stated in the bill, it has declined to institute a suit in its own behalf." R. 204 and 205.

The cases are numerous and uniform in favor of the proposition that,

> "Where the jurisdiction of the United States Court is dependent alone upon diversity of citizenship the parties should be arranged with reference to the real controversy presented by the pleadings, and not according to the arbitrary arrangement of the pleader."

Some of the cases are, First National Bank vs. Radford Trust Co., 80 Fed. 573, (in which Mr. Justice Lurton used the language quoted above); Removal Cases, 100 U. S. 457; Steele vs. Culver, 211 U. S. 26; City of Dawson vs. Columbia Trust Co. 197 U. S. 178; Venner vs. Great Northern Railroad, 209 U. S. 25; Stewart vs. Mitchell 172 Fed. 907; Stephens vs. Smart, 172, Fed. 466.

It is submitted that the fact that counsel for personal defendants, Zarecor and his associates, may have included the name of the corporation in the beginning of their pleas could not

change the legal status of the parties; that it could not change any aspect of the controversy, the real interest or attitude of any party, or create diversity of citizenship which did not otherwise exist. Jurisdiction resting upon diversity of citizenship cannot be conferred that way; and the lack of it cannot be waived by a plea, or even by agreement of all the parties. Nothing the individual defendants or their counsel might do could give the court jurisdiction in such a case, or relieve the court of its imperative duty under the statute to align parties according to their interest. There being no diversity of citizenship in the legal sense in the present case before the pleas were filed there was and could be none afterwards.

The pleas, in fact, as the court below held, are not the pleas of the corporation at all. Though its name is used in the introduction of the pleas they offer no defense for the corporation as such, but only for the individual defendants, Zarecor and his associates, who claim to be the true and lawful members of the Board of Publication, and as such entitled to the possession and management of the corporate property and business.

It is not our belief that any of the cases cited in the brief for appellants are controlling in their favor in this case. In Doctor vs. Harrington, 196 U. S. 579, and Venner vs. Great Northern Railroad, 209 U. S. 24, the controversy and right of action pleaded by the plaintiff was with and against both of the defendants. They were both on the same side of the particular question sought to be litigated. The Court so held in each case, and sustained the jurisdiction upon that ground, specifically stated in the opinions.

In the former case the court said:

> "The ultimate interest of the corporation made defendant may be the same as that of the stockholder made plaintiff, but the corporation may be under a control antagonistic to him, and made to act in a way detrimental to his rights. In other words, his interests and the interests of the corporation may be made subservient to some illegal purpose. If a contro-

versy hence arise, and the other conditions of jurisdiction exist, it can be litigated in the Federal Court." 196 U. S. 587.

That language is quoted and adopted by the court in the latter case, after the court had, on the preceding page, remarked that:

> "Both defendants unite, as sufficiently appears from the petition and other proceedings, in resisting the plaintiff's claim of illegality and fraud. They are alleged to have engaged in the same illegal and fraudulent conduct, and the injury is alleged to have been accomplished by their joint action. The plaintiff's controversy is with both and both are rightfully and necessarily made defendants, and neither can, for jurisdictional purposes, be regarded otherwise than as a defendant." 209 U. S. 32-3.

The case of Delaware and Hudson Company vs. Albany and Susquehanna, 213, U. S. 436, cited on the same page of brief for appellants, after considerable discussion, concludes with this statement;

> "Therefore, considering that this case by reason of its facts falls within the principle of Doctor vs. Harrington, we do not review the cases cited by appellee." 213 U. S. 452.

How different those cases from this one? These complainants have no controversy with the Board of Publication, the defendant corporation. It is not alleged to "be under a control antagnostic" to them, or that the corporation and the other defendants "have engaged in the same illegal and fradulent conduct," or that any injury has been "accomplished by their joint action." This bill contains no allegation of any kind against defendant corporation and seeks no relief against it. No complaint is made of anything the corporation has done, or is about to do, or may do. It is not charged with giving countenance or encouragement to the claims of the personal defendants, Zarecor and his associates, who are referred to in the bill as "supposed members of the Board of Publication," or with a purpose of surrendering the corporate property and business to them, or to their

management or control, or of being in any sense or to any extent subservient to them. In fact the corporation is by the bill arrayed against them, and placed in a position of direct antagonism to them. Such is the whole tenor of the bill, as abundantly appears from quotations hertofore made.

As to the case of Stewart vs. Denham, 115 U. S. 64, cited on a former page of the brief for appellants, we deem it sufficient to remark that, of course, jurisdiction once acquired as to parties already in court cannot be ousted by the intervention of other persons not indispensable parties. That case however is not like this one, in which it is denied that jurisdiction was ever acquired.

Nor do we believe that Smith vs. Swormstedt 16 How. 288, and Watson, vs. Jones, 13, Wal., 679, likewise cited in the opposing brief, are controlling as to the alignment of parties under the present statute. They were decided before the passage of the Judiciary Acts of 1875, now in force, and when the question of jurisdiction based on diversity of citizenship could be raised only by a plea in abatement or demurrer (Nashua Railroad vs. Lowell Railroad, 136 U. S. 373); and no such question was so raised, or otherwise suggested, considered or decided, in either of those cases. It may be observed also that all indispensable parties, persons fairly representing each side of each class of claimants, were before the court in each of those cases; which Zarecor and his associates insist is not true in the present case.

On pages 9, 10, and 11 of the opposing brief it is said, in substance that the pleader may properly select a few of a numerous class of persons on one side of a controversy and a few of the contesting class on the other side; and that such was the course pursued in this case, especial care being taken to make only citizens of Tennessee defendants and only citizens of other states complainants.

It is allowable, when necessary, under the practice in Courts

of Equity for a few of a large class of persons with a common interest to plead and for a few of a like opposing class to be impleaded. But the rule is one of necessity, and the privilege of the pleader must be exercised fairly and not collusively. Story's Eq. Pl. secs. 107 et. seq.; Daniel's Ch. Pl. & Pr. 238 et seq. Each side of each opposing class must have a fair representation in court, and its representatives must plead or be impleaded together, all on one side as complainants and all on the other side as defendants. They cannot be divided and some of the representatives on one side of the controversy placed on different sides of the litigation, some as complainants and some as defendants, as was done in this case. Every class must be fairly represented on both sides of the litigation; and if there be two or more opposing classes, as in the present instance, the opposite sides of every class must be fairly represented. Members of one class can not represent a different class; and representation of neither class can properly be omitted on either side.

Those claiming to be beneficiaries on one side, as the complainants here, (ministers, ruling elders, and non-official members of the Presbyterian Church, U. S. A.), must bring in a fair representation of those claiming to be beneficiaries on the other side (ministers and ruling elders and non-official members of the Cumberland Presbyterian Church); and Provine and his associates, who claim to be the true and lawful members of the Board of Publication and as such entitled to the possession and management of its property and business, must bring in Zarecor and his associates, who oppose that claim and for themselves assert exclusive membership in that Board and the consequent right of dominion over its assets and affairs. Complainants can not properly represent themselves in this litigation in one class, and also Provine and his associates, in another class. Opposing rights cannot properly be adjudged only when the opposing claimants are before the court.

Who now before the court can be said to fairly represent Provine and his associates? No one claiming to be a member

of the Board on their side of the controversy has plead or been impleaded.

The statement in the brief for appellants at pages 7 and 16, to the effect that the bill seeks only to have the court say who are the beneficiaries of this trust property and not who are the true and lawful members of the Board of Publication, is a mistaken statement. In fact the judgment of the court as to both of those questions and others is distinctly sought in the bill, that as to the true and lawful constituency of the Board of Publication being of prime importance, as already seen.

Appellees insist that the appellants did not exercise the requisite care to have all the classes of persons having a real interest in this litigation fairly represented. On the contrary only those on one side of the controversy in any of the different classes of persons interested are named as parties. Several ministers, ruling elders, and non-official members of the Presbyterian Church in the United States of America are on one side as complainants and as alleged beneficiaries; but no one of any other class on either side of the controversy is joined as complainant. No one of that class on the other side, that is, no minister, or ruling elder, or non-official member of the Cumberland Presbyterian Church is joined, as such, by name or otherwise as a contesting beneficiary. It is true that appellees, Zarecor and his associates, are members of the latter Church, but they are referred to in the allegations of the bill only as "supposed members of the Board of Publication of the Cumberland Presbyterian Church" (R. 2), and in the prayer it is sought to enjoin them "from taking possession, or attempting to take possession of any of the property of said corporation, or interfering in any manner with the possession, control and management of said corporation by its true and lawful members." R. 17.

J. H. Zarecor and his associates, (except A. C. Biddle, a citizen of Kentucky), who are thus referred to as "supposed members of the Board of Publication" and who are thus sought to be en-

joined from interfering with the "true and lawful members" of that Board, are impleaded as defendants; but none of those of the same class on the other side of the controversy, W. A. Provine and his associates, who are referred to and sought to be continued and protected in the possession, control and management of the corporate property and business, as "the true and lawful members" of the Board, are ~~not~~ made parties at all.

How can the court decide whether or not Provine and his associates are the true and lawful members of the Board of Publication and enforce their rights as such without having them before the court? How can the court adjudge that they are "the true and lawful members" of the Board and as such entitled to be continued and protected in the possession and control and management of the corporate property and business as the bill seeks, when they are not parties to the suit? How can the court adjudge and settle this controversy between these two sets of persons, J. H. Zarecor and his associates on the one hand and W. A. Provine and his associates on the other hand, when only Zarecor and his Tennessee associates are parties to the suit? If it was intended that the corporation because in sympathy with Provine and his associates and under their control and management, should stand for and represent them in this litigation, then, for that additional and conclusive reason, the corporation should be aligned with the complainants and on the opposite side of the suit from Zarecor and his associates against whom the relief is sought.

The Board of Publication itself, the corporation, is impleaded as a defendant for the purpose, among others, of having an alleged cloud removed from its title and to prevent depreciation in the value thereof and further embarrassment of its business, and of having the court say for the use and benefit of which of the two Churches it holds and shall hold the trust property: but it is really on the same side of the controversy with the complainants, as the allegations and the prayer of the bill show, and as the court below held.

No other parties are named in the bill.

If this court should not approve the process of reasoning by which Judge Sanford reached his conclusion and dismissed the bill, appellees, J. H. Zarecor and his associates, submit that the same conclusion and result should follow from a consideration of their pleas.

This court is not confined in its investigation to the reason or reasons given by the lower court for its judgment, but will consider the whole case, and affirm the judgment if any sound reason is found in its favor. Macon Grocery Co. vs. Atlantic Coast Line R. R. Co. 215, U. S. 501; Interstate Commerce Commission vs. Illinois Central R. R. Co., Ib., 453, 471.

It will consider the question of jurisdiction though not assigned as error, (Baltimore & Ohio R R. Co. vs. United States Ex. Rel., etc., 215 U. S. 481); and though not raised by either party. Louisville & Nashville R. R. Co. vs. Motley, 211 U. S. 149.

Appellees, Zarecor and his associates, in their first plea to the jurisdiction of the court say:

> "That the bill brought by the complainants does not present a proper controversy between citizens of different states (upon which ground alone jurisdiction is sought in this court), though the complainants have in their bill collusively made and omitted both complainants and defendants for the purpose of showing a diversity of citizenship and creating a case cognizable in this court. Complainants bring their bill for the alleged purpose of continuing and protecting certain persons, whose names they do not give, in the possession, control and management of the Publishing House and other property of the Board of Publication of the Cumberland Presbyterian Church located in Nashville, Tennessee; and they collusively omit the names of all such persons in order to make it appear that this court has jurisdiction of the alleged cause of action. Those persons are, W. A. Provine, Hamilton Parks, W. T. Hardison, and Jno. H. DeWitt, citizens of Nashville, Tennessee, J. M. Johnson, a citizen of Illinois, J. H. Reynolds, a citizen of Georgia, L. M. Rice, a

citizen of Kentucky, and M. G. Wood, a citizen of Missouri, in whom and in whom alone is the primary right of action, if any there be, for their own continuation and protection in the possession, control and management of the said property. They are alleged to compose the Board of Publication of the Cumberland Presbyterian Church and to be now and to have been for years in the rightful possession, control and management of the valuable property described in the bill and sought to be brought into litigation in this court." R. 96.

Also:

"These defendants aver, therefore, that all of those persons are manifestly indispensable parties to this suit and that they are omitted from the bill as parties for the collusive purpose of creating a case cognizable in this court; and that A. C. Biddle, one of the members of the Board, who was appointed by the General Assembly of the Cumberland Presbyterian Church with these personal defendants in May, 1907, and who is a citizen of the State of Kentucky, as are T. O. Helm and George Gillman (two of the complainants), is likewise an indispensable party, whose name is omitted from the bill for the same collusive purpose." R. 98.

Another averrment in the first plea, is:

"That the complainants and those for whom they sue, as appears from their bill, have no interest in the property of the Board of Publication of the Cumberland Presbyterian Church, unless and except by virtue of the said scheme of union and merger, which has by the court of last resort in Tennessee been adjudged unconstitutional, null and void; and yet the complainants bring their present bill for the obvious purpose of defeating the result of that decision and nullifying a rule of property established thereby, through the collusive making and omission of parties complainant and parties defendant in such manner as to present a controversy between citizens of different states and for the purpose of creating a case cognizable in this court, whose jurisdiction is, by complainants, invoked to reopen a controversy practically settled already by the Supreme Court of the State within whose borders the property involved is located." R. 100.

With the plea are exhibited copies of the bill and of one of the answers in that case, also a copy of the final decree of the Supreme Court therein. R. 158-160-179.

The allegations of the bill on which the alleged union and reunion is sought to be set up in the present case are literal copies of those made for the same purpose in the bill in that case.

The case of the City of Dawson vs. Columbia Trust Company, 197 U. S., 178, is especially pertinent at this point, the first subdivision of the headnote being as follows:

> "An arrangement of parties which is merely a contrivance between friends to found jurisdiction on diverse citizenship will not avail, and when it is obvious that a party who is really on the complainants side (as is the Board of Publication in the present case) has been made a defendant for jurisdictional reasons, and for the purpose of reopening, in the United States Courts, a controversy already decided in the State Courts, the court will look beyond the pleadings and arrange the parties according to their actual sides in the dispute."

The court below overruled the first plea, because, as construed, its averments go only to the improper and collusive *omission* of indispensable parties, and should otherwise be treated as conclusions of law. R. 202-3.

The language of this plea has already been set out sufficiently; and, without repeating it or discussing the question, appellees confidently insist that the averments are averments of fact, that they mean and say, in brief that the complainants have improperly and collusively made and omitted indispensable parties (giving the names of those so omitted), for the purpose of creating a case cognizable in the Circuit Court of the United States and for the purpose of reopening in that court a case practically settled in the State courts already.

It is hardly necessary to cite authorities for the proposition

that, on a motion to strike out or to overrule a plea for insufficiency as in this case, all facts well averred are to be taken as true for the purposes of the motion. The rule is stated in standard works or pleading and practice, also in Farley vs. Kittson, 120 U. S. 303, 314, and numerous other cases.

Nor need we do more than refer to Sec. 5, of Chap. 137 of the Judiciary Act of 1875, 18 Statutes at Large 470, and a few of the adjudged cases, already cited, for the imperative requirement,

> "That if, in any suit commenced in a Circuit Court . . . it shall appear to the satisfaction of said Circuit Court, at any time after such suit has been brought . . . that the parties to said suit have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable . . . under this Act, the said Circuit Court shall proceed no further therein, but shall dismiss the suit."

Therefore, under that rule and that statute and those cases, it is contended for appellees that their first plea, when considered on the motion, shows and is conclusive of the fact that the parties to this suit have been improperly or collusively made or joined for the purpose of creating a case cognizable in the Circuit Court of the United States, in consequence of which "the court shall proceed no further therein, but dismiss the suit," ~~the court shall proceed no further therein, but dismiss the suit.~~"

The thing or fact, whose appearance to the satisfaction of the Circuit Court, shall impel and compel a cessation of the proceeding and a dismissal of the suit, is, "that the parties to said suit have been improperly or collusively made and joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable" in that court. That language, we submit, embraces the course pursued and the reason for it, its active and passive features alike, omissions as well as commissions, intended improperly or collusively to accomplish the contemplated imposi-

tion on the jurisdiction of the court. The act condemned by the statute, and to be defeated by the court when discovered, is one that is intended to create a case cognizable in the Federal Court, by an improper or collusive *selection* as well as *arrangement* of parties.

Indispensable parties can no more be omitted, improperly and collusively for the purpose of conferring jurisdiction on that court, than they can be improperly and collusively arranged for the same purpose. In our humble judgment the improper and collusive omission of W. A. Provine and his associates from the suit as averred in the plea, they being indispensable parties as also averred in the plea, is just as much within the reason of the statute, as impleading them as defendants, when really on the same side of the controversy as the complainants, would have been, the object being the same in each instance—the creation of a case cognizable in the Federal Court.

But if this be not a true construction of that part of Sec. 5, Ch. 137 of the Judiciary Act of 1875, and pleaders may at their option and without risk, so far as that Act is concerned, omit indispensable parties, still such omission is fatal to the bill under the general rule of practice requiring all indispensable parties to be brought before the court.

The bill of appellants describes W. A. Provine and his associates as "the true and lawful members" of the Board of Publication, and by its allegations as to their present possession and control and management of the corporate property and business, (R. 3, 4 & 5), and its prayer for their continuance and protection therein, (R. 17), shows them to be indispensable parties; but it does not give their names.

The plea of appellees concedes the present possession, control and management of the corporate property and business by W A. Provine and his associates. It sets out their names and citizenship and avers that they are indispensable parties being the persons, in whom is the primary right of action, if any there be. R. 96.

The second plea interposed the pendency of the suit by the State on relation of Zarecor and his associates against Provine and his associates in the Chancery Court at Nashville, Tennessee, involving the same controversy about the membership of the Board of Publication and the possession, control and management of the corporate property and business. That plea concludes with the averment:

> "Which controversy, under the law of Tennessee, could properly be presented for adjudication and settlement in court only by a bill in the name of the State in the nature of a quo warranto, on the relation of those named as relators therein and who are the personal defendants in the present bill with the addition of A. C. Biddle." R. 102.

Copies of the bill and answer in the case in the Chancery Court are exhibited with the plea. R. 104-130.

Which of the two classes of contending persons, Zarecor and his associates, or Provine and his associates, in fact and in law constitute the true official membership of the Board of Publication of the Cumberland Presbyterian Church? Who, those of the one class or those of the other, are the real official constituents of the Board, and as such entitled in law to the possession and control and management of the corporate property and business involved in this litigation, and for the use and benefit of which of the two Churches? These are questions raised in the present bill, and the second plea says that this court is without jurisdiction to decide them; that they can be decided alone by the State Courts, and in a suit brought by the State itself; and further that the State now has pending in the Chancery Court at Nashville, Tennessee, such a suit; and that this court, if it had jurisdiction otherwise, would, at least, as a matter of comity, not assume jurisdiction as against the State court, or in conflict with its prior assumption of jurisdiction.

This corporation, The Board of Publication of the Cumberland Presbyterian Church, was chartered by the State of Tennessee.

It is the creature of the State, and subject to the State's control in an important sense. It has acquired and holds property by the State's permission and under the State's protection. Without the State's authority, the corporation could have no property and no existance. Then why should not the State have the exclusive right to bring a suit, as it has done, and in one of its own courts, to determine who constitute the official membership of the Board of Publication, the corporation, and who, as members thereof, are entitled to the possession and control and management of its property and business and for whom?

If mistaken in the view that such an action will lie alone at the instance of the State, and in the name of the State creating the corporation, and only in a court of the State, under the provisions of its own statute, then, why should not this court, in the present case, refuse, as a matter of comity at least, to interfere with such a suit previously brought by the State, and finally make the judgment of the State Court, when pronounced, in the previous case, its own judgment? The adjudged cases hold that it will. Zimmerman vs. SoRell, 80 Fed., 417; Bunker Hill vs. Sheshone Mining Co., 109 Fed., 405; Powers vs. Blue Grass, etc., 86, Fed., 705; and citations. The opinion in the last mentioned case was delivered by Mr. Justice Lurton when on the Circuit Court of Appeals.

It is respectfully submitted that the court below was without jurisdiction and that the judgment dismissing the bill for that reason should be affirmed.

FRANK SLEMONS,
W. B. LAMB,
W. C. CALDWELL,
Solicitors for Appellees.

HELM *v.* ZARECOR.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF TENNESSEE.

No. 395. Submitted October 9, 1911.—Decided November 6, 1911.

In determining whether diversity of citizenship exists to give jurisdiction it is the duty of the Circuit Court to arrange the parties with respect to the actual controversy looking beyond the formal arrangement made by the bill.

Where, as in this case, the controversy over the control of a corporation transcends the rivalry of those claiming to be members of its board of control and the corporation itself is a mere instrumentality or title holder, it is properly made a party defendant and should not be aligned as a party plaintiff merely because the plaintiffs belong to the same faction that claims the power to appoint the members of the board of control.

THE facts, which involve the jurisdiction of the Circuit Court of the United States in this case, are stated in the opinion.

Mr. John M. Gaut and *Mr. Alexander P. Humphrey* for the appellants.

Mr. W. C. Caldwell, Mr. Frank Slemons and *Mr. W. B. Lamb* for the appellees.

MR. JUSTICE HUGHES delivered the opinion of the court.

The sole question presented by this appeal is with respect to the jurisdiction of the Circuit Court.

The bill, as amended, was brought by certain ministers, ruling elders and laymen of the Presbyterian Church in the United States of America, citizens of States other than

Tennessee, suing for themselves and for all the members of said church, against individuals, citizens of Tennessee, described as representing not only their own interests but also those of all the members of the Cumberland Presbyterian Church, and "The Board of Publication of the Cumberland Presbyterian Church," a Tennessee corporation.

The controversy disclosed by the bill arose from the proceedings, taken in 1906, to effect the union of the Cumberland Presbyterian Church and the Presbyterian Church in the United States of America, both voluntary religious associations, and relates to the property and management of the defendant corporation. The Board of Publication had been incorporated in 1860, under the direction of the General Assembly of the Cumberland Presbyterian Church, for the purpose of conducting its publishing work, and had acquired valuable property consisting of a publishing house and its equipment in Nashville, Tennessee. The original members of the corporation were the committee of publication of the Church, and their successors under the charter were appointed by the General Assembly to which was committed its regulation and control.

The bill alleged that the two Churches had been legally united and that as a result the property in question was held by the corporation in trust "for the entire reunited denomination;" and, further, that "the Board and its officers and managers were advised and believed and still believe" that the union was valid, that "thereby the Board of Publication became a corporation and institution of the reunited Church," and that the managers of the corporation "could do nothing else than recognize the General Assembly of the united Church by reporting to it and otherwise recognizing its authority." It was also alleged that a minority of the members of the Cumberland Presbyterian Church, and of its ministers, who

were opposed to the consolidation, repudiated it and effected a separate organization under the former name, and that thereupon a body assuming to be the General Assembly of the Cumberland Presbyterian Church declared the offices of all the members of the Board of Publication vacant and proceeded to elect persons of their own organization to fill the supposed vacancies. These persons had made demand for the possession of the corporate property, claiming to be the rightful members of the corporation and that its property was held in trust for the religious association by whose General Assembly they had been elected. It was stated that this claim cast a cloud upon the equitable title to the property. After reviewing at length the history of the Cumberland Presbyterian Church, the action of the representatives of the two Churches which culminated in the alleged consolidation, and the subsequent antagonistic proceedings, the bill prayed for decree that the property in question is held in trust by the corporation for the benefit of the Presbyterian Church in the United States of America or the members thereof, and that the members of the Board elected by the reunited Church are the true and lawful members of said Board; that the defendants be enjoined from interfering with the control and management of the corporation by those members or with the corporate property, and that if mistaken with respect to the relief prayed for as to the persons who constitute the Board and have the right of management the court should decree that "whoever may be the members of the Board and whoever may be entitled to such management, they shall manage the corporation and administer the trust for the use and benefit of said reunited Church."

The defendants filed two pleas to the jurisdiction. In the first plea it was alleged that the complainants had collusively made and omitted both complainants and defendants for the purpose of showing the requisite diversity

of citizenship. The second plea set up the pendency of a suit in the Chancery Court of Davidson County, Tennessee, in the nature of a *quo warranto* proceeding, brought on the relation of J. H. Zarecor and other individual defendants herein to oust those named as defendants in that suit from membership in the Board of Publication, and from the control and management of its property and to install the relators in their stead. These pleas the court below overruled. As to the ground of the first plea, that certain persons had been omitted as parties, the court held that § 5 of the Judiciary Act of March 3, 1875, c. 137, 18 Stat. 472, relates solely to the collusive making of the actual parties plaintiff or the collusive joinder of the actual parties defendant, and that if the parties before the court are properly aligned as plaintiffs and defendants, it is not a ground of dismissal, in so far as the jurisdictional question is concerned, that necessary parties are omitted, either as plaintiffs or defendants, whose presence would defeat the jurisdiction of the court. While the omission of indispensable parties, if any, said the court, would be a ground for dismissal on the merits if they were not joined, or if joined and on proper alignment their citizenship was such as to defeat the Federal jurisdiction, a plea to the jurisdiction would then lie, their omission in the meantime could not defeat the jurisdiction of the court in a controversy between the parties who were before the court. And so far as the first plea was based upon the ground that the complainants had collusively made parties plaintiffs and defendants for the purpose of showing a diversity of citizenship, the plea was held to be insufficient in law in that it did not specify what parties are alleged to have been collusively made. The second plea was overruled because it did not reach the whole case made by the bill, as the bill did not merely ask a determination as to the persons who were the true and lawful members of the corporation, which was the only

matter involved in the *quo warranto* proceeding in the state court, but sought a decree declaring the trust upon which the property of the corporation is held and the uses and purposes for which it is to be administered, whoever might be found to be the true and lawful members of the corporation. We need add nothing to what was said by the court below upon these points.

But the court of its own motion dismissed the bill for want of jurisdiction, for the reason that the defendant corporation, the Board of Publication, was not antagonistic to the complainants, and should be aligned upon the same side of the controversy with the complainants; and that, therefore, upon such alignment, some of the defendants and one of the complainants being citizens of the same State, the Circuit Court had no jurisdiction. In this we think the court erred.

It was, undoubtedly, the duty of the court in determining whether there was the requisite diversity of citizenship to arrange the parties with respect to the actual controversy, looking beyond the formal arrangement made by the bill. *Removal Cases*, 100 U. S. 457; *Detroit* v. *Dean*, 106 U. S. 537; *Dawson* v. *Columbia Avenue Trust Company*, 197 U. S. 178; *Steele* v. *Culver*, 211 U. S. 26. What then is the controversy?

The suit cannot properly be said to be brought to enforce a right inhering in the Board of Publication or by the complainants as members of that corporation. And the question whether the Board may be assigned a place on the other side of the controversy is not to be answered by applying the rule which governs suits by shareholders on behalf of a corporation or by beneficiaries in the right of a trustee. *Hawes* v. *Oakland*, 104 U. S. 450, 461; *Doctor* v. *Harrington*, 196 U. S. 579, 587; *Pacific Railroad Co.* v. *Ketchum*, 101 U. S. 289, 299. The complainants sue for themselves and on behalf of all members of the Presbyterian Church in the United States of America,

and the object of their suit is to enforce the right of the members of that Church as it was constituted after the alleged union. The Board of Publication was incorporated merely as a convenient agency for the publishing work of the Cumberland Presbyterian Church. The charter clearly discloses its character. The representative assembly of the Church was to fill the vacancies in its membership and control its conduct. It was an incorporated committee of publication, which lost none of its essential qualities as an agent of denominational service when it became an artificial person, clothed with power to hold property in a corporate capacity. The language of the charter is that "said Board shall be subject to the regulation and control of the General Assembly of said Church under its past and future actions on the subject; the number of the Board may be increased or diminished and all vacancies filled as the said authority has or may direct; the General Assembly of the Church shall also have power to locate the Board and change the same at pleasure; and also at any time to alter the name of said corporation or dissolve the same, but not so as to prejudice the rights of others." The contention of the complainants is that, after the union, the Cumberland Presbyterian Church continued in the united Church and that the General Assembly of the latter succeeded to the authority formerly possessed by the General Assembly of the separate denomination. The defendants are sued as the representatives of the religious association which insists that it is still the original Cumberland Presbyterian Church, continuing with all its separate powers unimpaired.

It is thus evident that the controversy transcends the rivalries of those claiming membership in the Board and the assertion of rights inhering in that corporation itself. It embraces the fundamental question of the rights of these religious associations, said to be represented by the respective parties, to use and control the corporate agency and

to have the benefit in their denominational work of the corporate property. Viewed in this aspect, the relation of the corporation to the controversy is not to be determined by the attitude of alleged members of the Board who believed the union to have been consummated, nor by the fact that it does not appear that they have surrendered possession. These do not suffice to identify the interest of the corporation with that of the complainants. And the individual defendants actually joined it with themselves in filing the pleas to the jurisdiction, and in this way, it may be assumed, they sought to emphasize the contention that the Board was under the exclusive direction of the separate association to which they adhered and should be employed solely for its benefit.

To align the corporation itself with the complainants is virtually to decide the merits in their favor. The Board is simply a title holder, *Watson* v. *Jones*, 13 Wall. 679, 720; an instrumentality, the mastery of which is in dispute. But, as it is the holder of the legal title, the complainants seek a decree defining, in the light of the proceedings alleged in the bill, the equitable obligations arising from the nature and purpose of the corporate organization.

We are therefore of opinion that the corporation was properly made a party defendant and that the court erred in dismissing the bill for want of jurisdiction.

Decree reversed.